Supreme Court, U.S.
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No. 04-1127

In The
Supreme Court of the United States

PREMIERE TECHNOLOGIES, INC., N/K/A PREMIERE GLOBAL SERVICES, INC., BOLAND T. JONES, PATRICK G. JONES, GEORGE W. BAKER, SR., and RAYMOND H. PIRTLE,

Petitioners,

v.

APA EXCELSIOR III, L.P., APA EXCELSIOR III OFFSHORE L.P., APA/FOSTIN PENNSYLVANIA VENTURE CAPITAL FUND, CIN VENTURE NOMINEES LIMITED, STUART A. EPSTEIN, and DAVID EPSTEIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), permits directors and officers of a public company to assert standing under Section 11 of the Securities Act, 15 U.S.C. § 77k, as to a registration statement issued in connection with a merger where they made their investment decision before the registration statement was effective and where they failed to discharge their duties regarding the merger as "gatekeepers" as to the public market shareholders.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Premiere Technologies, Inc., n/k/a Premiere Global Services, Inc., Boland T. Jones, Patrick G. Jones, George W. Baker, Sr., and Raymond H. Pirtle.[1]

Respondents are APA Excelsior III, L.P., APA Excelsior III Offshore L.P., APA/Fostin Pennsylvania Venture Capital Fund, CIN Venture Nominees Limited, Stuart A. Epstein, and David Epstein.

CORPORATE DISCLOSURE STATEMENT

Premiere Technologies, Inc., n/k/a Premiere Global Services, Inc., is a corporation organized under the laws of the State of Georgia. It does not have a parent corporation, and no publicly-held company owns 10 percent or more of the stock of the corporation.

[1] Eduard J. Mayer was also a Defendant in the proceedings below but is not a Petitioner here.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Premiere Technologies, Inc., n/k/a Premiere Global Services, Inc., *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Northern District of Georgia are unreported and are reprinted in the appendix hereto ("App.") at App. 1 to 51. The District Court's Order entering judgment is reprinted at App. 52. The Order of the Court of Appeals denying rehearing and hearing *en banc* is reprinted at App. 54.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered judgment on September 23, 2004, and entered an order denying rehearing and hearing *en banc* on November 22, 2004. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT STATUTORY PROVISIONS

Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, is reprinted at App. 56.

STATEMENT OF THE CASE

Introduction

This case arises out of a merger in which Respondents/Plaintiffs, who were sophisticated, "venture" investors and directors of Xpedite Systems, Inc. ("Xpedite") committed to acquire shares of Premiere Technologies, Inc. (n/k/a Premiere Global Services, Inc.) ("Premiere" or the "Company"), the acquiring corporation, prior to the public offering of shares in conjunction with the merger. These investors had access to inside information and due diligence obligations. They also profited handsomely from the merger. Nevertheless, discontent with the windfall they received, these insiders brought several claims against Petitioners/Defendants Premiere and certain of its directors and officers after the Company experienced a temporary downturn.

All of the various claims have been dismissed except for a claim under Section 11 of the Securities Act of 1933 ("Section 11"), 15 U.S.C. § 77k. That claim is based on alleged misrepresentations or omissions in the Registration Statement filed in conjunction with the merger. That Registration Statement, however, was not effective until after Plaintiffs made their investment decision.

Although Plaintiffs did not acquire their shares via the public offering process, the United States Court of Appeals for the Eleventh Circuit held that Plaintiffs had standing under Section 11. The Eleventh Circuit's holding is contrary to *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), and public policy. Thus, this Court should grant this Petition for Certiorari to resolve a split in the lower courts and to provide guidance in an important and developing area of the law.

Factual Background

Xpedite was a publicly traded company that provided enhanced facsimile transmission services. App. 23. Plaintiffs are all former Xpedite shareholders who each held a large stake in the company. App. 2. Certain of Plaintiffs are investment funds (the "APA Funds"), which are members of the Alan Patricof family of funds. App. 23. Patricof and his company, APA, provided investment fund management services to large, sophisticated institutional investors. Robert Chefitz, a Patricof employee, was charged with monitoring the APA Funds' investment in Xpedite. App. 2. He and another Patricof employee held seats on Xpedite's Board of Directors ("Xpedite's Board" or the "Board") due to the APA Funds' significant holdings in Xpedite. App. 2. The remaining Plaintiffs, Stuart Epstein and David Epstein, are brothers who made substantial venture investments in Xpedite as individual investors and who as a result maintained a joint seat on Xpedite's Board. App. 2.

In February 1997, the Board established a Special Committee (the "Committee") to explore strategic alternatives to achieve liquidity for the large venture investors and value for public market shareholders. App. 3. Both Chefitz and David Epstein were appointed to the Special Committee, which was assisted by Merrill Lynch, Pierce, Fenner & Smith, Inc. as its financial investment advisor, by Ernst & Young LLP as its audit advisor, and by Paul Hastings, Janofsky & Walker LLP for legal due diligence. App. 3.

In October 1997, Premiere expressed an interest in acquiring Xpedite. App. 3. Upon receipt of an offer from Premiere, the Special Committee was obligated to conduct

a due diligence investigation into the offer and to make a recommendation to the Board. Chefitz led the Committee's due diligence efforts, and the Committee, including Plaintiff David Epstein as a member, was given access to voluminous amounts of confidential and non-public information regarding Premiere. App. 36-37.

The Special Committee recommended to Xpedite's Board that the merger offer should be accepted. The two companies agreed on a stock-for-stock transaction that valued Xpedite stock at $34 per share. App. 24.

Separate from and prior to the public offering process that was to be associated with the merger, Plaintiffs executed a Stockholder Agreement in November 1997. App. 3-4, 64-95. The Stockholder Agreement granted an irrevocable proxy to Premiere's Board of Directors to vote in favor of the merger, thereby reflecting Plaintiffs' investment decision as to Premiere.[2] Also in November 1997, Plaintiffs executed Affiliate Letters, in which they agreed to the placement of a restrictive legend on their Premiere stock certificates. App. 4, 96-126. The Affiliate Letters provided, among other things, that Plaintiffs would be subject to a minimum of a 30-day post-merger lock-up within which they were prohibited from selling their Premiere stock. Plaintiffs further agreed that Premiere was "under no obligation to file a registration statement with the SEC covering the disposition of the undersigned's shares. . . . " App. 4, 99. Thus, Plaintiffs conceded that their acquisition of shares was separate from the subsequent offering.

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[2] The SEC has recognized that executing such agreements constitutes an investment decision. *See* Regulation of Securities Offerings, Securities Act Release No. 33-7606A, 67 F.R. 67174-01, 67236 (Dec. 4, 1998); *see also infra* at 6, 11.

In January 1998, Premiere filed a Registration Statement for the Xpedite merger with the Securities and Exchange Commission (SEC), which became effective on January 28, 1998 and thereby initiated the public offering process. App. 25. The following day Premiere also distributed a Prospectus to Xpedite shareholders as part of the Registration Statement. App. 25. Upon consummation of the merger on February 27, 1998, Plaintiffs enjoyed a 500% return on their initial investment in Xpedite. App. 25.

Procedural Background

After the price of Premiere shares fell in June 1998, Plaintiffs filed suit against Premiere and certain of its directors and officers, alleging breach of contract, negligent misrepresentation, and violations of Sections 11, 12(a)(2), and 15 of the Securities Act, based on alleged misstatements in the Registration Statement. App. 25-28.

Judge J. Owen Forrester, United States District Judge for the Northern District of Georgia,[3] dismissed the breach of contract claims but permitted the remaining claims to proceed. App. 26-27.

After the completion of discovery, Defendants filed a Motion for Summary Judgment. The District Court granted that Motion, holding, in relevant part, "that it would not serve the purposes of the [Securities Act] to allow sophisticated investors who had access to significant confidential and inside information through the exercise of

[3] Jurisdiction in that court was proper under 15 U.S.C. § 77v and 28 U.S.C. §§ 1331 and 1337.

due diligence rights to convert their acquisition of securities into a public offering by mere fact that Defendants provided a Registration Statement." App. 50.

Plaintiffs appealed to the United States Court of Appeals for the Eleventh Circuit. App. 1-2. During oral argument before the Eleventh Circuit, Plaintiffs explicitly abandoned their Section 12 claim. App. 2. The Eleventh Circuit affirmed the dismissal of the negligent misrepresentation claims, holding that reasonable reliance could not be established because Plaintiffs had failed to exercise their due diligence rights "in a meaningful way." App. 17.

The Eleventh Circuit, however, reversed as to the Section 11 claim. Although agreeing that Plaintiffs had "committed" to acquiring Premiere shares prior to the filing of the Registration Statement, the Court nevertheless held that standing existed under Section 11. App. 6, 13.

Defendants petitioned the Eleventh Circuit for a Partial Rehearing, or, Alternatively, Partial Hearing *En Banc*. That Petition was denied on November 22, 2004. App. 54-55.

REASONS FOR ALLOWANCE OF THE WRIT

I. Review by this Court is necessary to resolve a conflict in the lower courts as to the scope of this Court's holding in *Gustafson v. Alloyd Co.*

The Eleventh Circuit's holding is inconsistent with the rationale and public policy underlying *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). A ruling by this Court can resolve a division in the lower courts as to the scope of *Gustafson*'s

holding and can provide important guidance as to the securities laws.

Gustafson holds that standing exists under Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2), only as to securities sold in a public offering. *Id.* at 580-81. Relying on textual interpretation and legislative history, this Court recognized the narrow scope of liability under the Securities Act:

> It is understandable that Congress would provide buyers with a right to rescind, without proof of fraud or reliance, as to misstatements contained in a document prepared with care, following well-established procedures relating to investigations with due diligence and in the context of a public offering by an issuer or its controlling shareholders.

Id. at 578. Accordingly, *Gustafson* confirmed that the meaningful change effected by the Securities Act was "the creation of federal duties – for the most part, registration and disclosure obligations – in connection with public offerings." *Id.* at 571.

Subsequently, the lower courts have disagreed as to *Gustafson*'s applicability to Section 11. Some courts have limited *Gustafson* to Section 12, concluding that a Section 11 cause of action is permitted for aftermarket public purchases of securities that are traceable to an allegedly misleading registration statement; others have extended *Gustafson*'s rationale to hold that aftermarket public purchasers are precluded from bringing a Section 11 claim. *Compare DeMaria v. Andersen*, 318 F.3d 170, 178 (2d Cir. 2003) (holding that *Gustafson* does not apply to Section 11 claims); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871-72

(5th Cir. 2003) (same); *Lee v. Ernst & Young, LLP*, 294 F.3d 969, 977 (8th Cir. 2002) (same); *Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000) (same); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1080 (9th Cir. 1999) (same); *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1369 (S.D. Fla. 2001) (same); *with McKowan Lowe & Co. v. Jasmine Ltd.*, 127 F. Supp. 2d 516, 543 (D.N.J. 2000) (holding that Section 11 applies "only to stocks bought in an initial public offering. . . ."), *vacated on other grounds by*, 295 F.3d 380 (3d Cir. 2002); *Brosious v. Children's Place Retail Stores*, 189 F.R.D. 138, 144 (D.N.J. 1999) ("[S]econdary market purchasers do not have standing under [Section] 11."); *Gannon v. Cont'l Ins. Co.*, 920 F. Supp. 566, 575 (D.N.J. 1996) (Section 11 applies "only to stocks bought in an initial public offering and not to stocks purchased through secondary market transactions").

The lower courts that have accorded standing to aftermarket purchasers of securities in public markets have done so by interpreting the language of the statute and discounting "extrinsic sources[,]" such as *Gustafson* and the scope of the Securities Act as explained therein. *See, e.g.*, *DeMaria*, 318 F.3d at 177. These decisions have particularly considered persuasive Section 11's reference to "any person acquiring such security" and the reference point it establishes for measuring damages. 15 U.S.C. § 77k(a), (e); *DeMaria*, 318 F.3d at 176-77; *Rosenzweig*, 332 F.3d at 872-73. They have also relied on the pre-*Gustafson* concept of "tracing," which has traditionally permitted a Section 11 claim as to any securities that can be traced to an allegedly defective registration statement.[4] *DeMaria*,

[4] The concept of tracing expands the scope of Section 11 liability. Its application to the facts at hand is particularly problematical because

(Continued on following page)

318 F.3d at 177; *Rosenzweig*, 332 F.3d at 873. Holding that Section 12 demands "privity between the purchaser and seller" whereas Section 11 does not, these holdings have declined to assess Section 11 standing in light of guidance provided in *Gustafson* as to the public policy underlying the Securities Act and the liability scheme established by its enactment. *DeMaria*, 318 F.3d at 178. Instead, these decisions have granted Section 11 standing to market purchasers while stating that "the Supreme Court's concern about extensive liability far beyond the initial offering is not implicated. In fact, by giving would-be defendants more incentive for compliance, the broader interpretation of [Section] 11, more so than the [*Gustafson*-imposed] limited reading, better effectuates the statutory purpose of regulating public offerings." *Rosenzweig*, 332 F.3d at 873.

In contrast, lower courts that granted Section 11 standing only as to securities purchased directly in a public offering have relied on *Gustafson*'s specific holding that liability from misstatements in a prospectus may stem only from shares purchased directly in an offering. *See Sturm v. Marriott Marquis Corp.*, 26 F. Supp. 2d 1358, 1370 (N.D. Ga. 1998); *Gannon*, 920 F. Supp. at 575. Because both Sections 11 and 12 share the same legislative history, these courts have extended *Gustafson* to Section 11. *See Warden v. Crown Am. Realty Trust*, No. Civ.A. 96-25J, 1998 WL 725946, at *2 (W.D. Pa. 1998).

Plaintiffs committed to their Premiere shares prior to the initial offering associated with the merger. Tracing is, therefore, logically inapplicable. Thus, even this inconsistency militates in favor of extending *Gustafson* to Section 11 claims so as to minimize the impact of such illogical theories.

With this background, the Eleventh Circuit acknowledged that *Gustafson* offered some support to Defendants' position that Plaintiffs' Section 11 claim was barred. App. 8. Nevertheless, by overlooking the binding force of *Gustafson* and invoking the integration doctrine,[5] the Eleventh Circuit ruled in conflict to this Court's precedent and granted standing to Plaintiffs. As a result, the controversy over the extension of *Gustafson* to Section 11 claims is ripe for resolution, and this Court should grant Defendants' Petition for Writ of Certiorari so as to clarify the scope of the holding of this important precedent.

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[5] The integration doctrine is irrelevant to the application of *Gustafson*, and the Eleventh Circuit erred by invoking it. The integration doctrine explicates when multiple securities offerings occurring during a given time period "are to be considered a single offering for purposes of determining an exemption from registration." Black's Law Dictionary 812 (7th ed. 1999). It is wholly inapposite to the facts at hand because it relates only to the question of whether the offering should have been registered and is relevant only to a claim brought under Section 12(a)(1) for failure to register securities before their issuance. *See, e.g.*, *SEC v. Murphy*, 626 F.2d 633, 645-46 (9th Cir. 1980); *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 901 n.9 (5th Cir. 1977); *Koehler v. Pulvers*, 614 F. Supp. 829, 840-44 (S.D. Cal. 1985); *Bowers v. Columbia Gen. Corp.*, 336 F. Supp. 609, 624-25 (D. Del. 1971). Here, Plaintiffs admitted by signing the Affiliate Letters that their acquisition was not pursuant to a public offering. Various articulations by the SEC also support this rationale. *See* 17 C.F.R. § 230.152; Black Box Inc., SEC No-Action Letter, 1992 WL 55818, at *2-3 (Feb. 28, 1992); Black Box Inc., SEC No-Action Letter, 1990 WL 286633, at *15-16 (June 26, 1990); Non-Public Offering Exemption, Securities Act Release No. 33-4552, 1962 WL 69540, at *4 (Nov. 6, 1962).

II. The Securities Act and public policy mandate that the divergence of opinion amongst the lower courts be resolved by explicit guidance from this Court that *Gustafson* controls as to Section 11 claims.

Gustafson held that the term "prospectus," as employed in Section 12(a)(2), can be relevant only to a solicitation of the public to acquire securities. 513 U.S. at 574. Likewise, an allegedly misleading registration statement, as referenced in Section 11, should accord standing to bring a claim for civil liability solely to those who purchase securities directly pursuant to the registration statement. In particular, sophisticated, inside investors "who committed to a purchase prior to the filing of a registration statement" should not, under *Gustafson*, have standing to assert a Section 11 claim. App. 6. Such an extension of *Gustafson* is necessary to ensure Section 11 is interpreted in line with the intent underlying the Securities Act legislation and in furtherance of current directorial obligations to function as "gatekeepers" protecting the interests of public market shareholders.

"The overriding purpose of our [n]ation's securities laws is to protect investors and to maintain confidence in the securities markets. . . . " H.R. Conf. Rep. No. 104-369, at 31 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 731. In enacting the legislation, Congress focused on protecting unseasoned investors, and "[t]he sale of an issue of securities to . . . a limited group of experienced investors . . . was certainly not a matter of concern to the federal government." James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 Geo. Wash. L. Rev. 29, 37 (1959-60).

Accordingly, the Securities Act provides an umbrella of protection only to public purchasers of securities, and the Act's provisions do not impose any duties in conjunction with privately negotiated offerings. By tying liability to a misleading registration statement, Section 11 embodies these purposes underlying the Securities Act. The registration statement is designed to provide a market of unsophisticated investors with a reserve of reliable information based upon which to make investment decisions. *See* The Laws that Govern the Securities Industry, United States Securities and Exchange Commission, *available at* http://www.sec.gov/about/laws.shtml. Investors who do not acquire directly in a public offering cannot invoke protection under Section 11 or any other provision of the Securities Act. *See Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 904 (5th Cir. 1977). It was believed by the authors of the legislation that "bureaucracy, untrained in these matters as it was, could hardly equal these investors for sophistication, provided only it was their own money that they were spending." Landis, *supra*, at 37. Thus, *Gustafson* should be extended to Section 11 claims to promote the designed purposes of the Securities Act and to preclude to private offering purchasers standing to bring a claim.

The extension of *Gustafson* to Section 11 claims will also be in furtherance of the liability regime established by the federal securities laws. In particular, the Securities Act creates a lower standard for establishing liability than the Securities Exchange Act.[6] *See, e.g., In re Unicapital Corp.*

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[6] The Securities Exchange Act, conversely, imposes a greater burden of proof on plaintiffs and, as a result, does not demand that the potential class of plaintiffs who may bring claims thereunder be narrowly restricted. In particular, claims under the Exchange Act place on plaintiffs the significant onus to prove that a defendant acted with scienter. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976).

Sec. Litig., 149 F. Supp. 2d 1353, 1363 (S.D. Fla. 2001). A Section 11 claim, for example, does not require proof of scienter. *See, e.g., In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 274 n.7 (3d Cir. 2004). Because the burden on a Section 11 plaintiff is comparatively low, the Securities Act, and the integrity of this nation's securities regulation scheme, demand that the pool of potential purchasers who would qualify to bring a claim under Section 11 be narrowly defined. Expanding the pool of potential plaintiffs would chill issuers in a manner inconsistent with the intent of the Securities Act.

Furthermore, extending *Gustafson* to Section 11 is consistent with recent public policy articulations by lawmakers and regulators as to the additional "gatekeeping" responsibilities shouldered by inside directors, such as Plaintiffs here. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). As discussed above, inside investors are not the type to whom the design of the Securities Act affords protection. To the contrary, they are corporate actors upon whom the SEC relies to be the stewards of corporate governance, to establish an ethical "tone at the top[,]" and to protect the interests of public market shareholders. SEC Chairman William H. Donaldson, Remarks Before the Foreign Policy Association (Sept. 25, 2003) (available on Westlaw at 2003 WL 23638628); *see also* SEC Commissioner Cynthia A. Glassman, Remarks Before the Aspen Institute Italia Seminars for Leaders (Nov. 7, 2003) (available on Westlaw at 2003 WL 23638648). The extension of *Gustafson* would preclude such pre-registration statement investors from having standing to assert a Section 11 claim. Limiting the scope of Section 11 liability accordingly would thwart any rewards to such inside investors for failing to conduct their

due diligence obligations to protect public shareholders, and for acting in a singularly self-interested manner that is contradictory to the private policing system that the SEC is actively promoting and strengthening. *See* SEC Chairman William H. Donaldson, Remarks from Directors College at Stanford University Law School (June 20, 2004) (available on Westlaw at 2004 WL 1571974).

Thus, both the purposes of the Securities Act and the SEC's emphasis on directors as "gatekeepers" and "watch-dogs" counsel that this Court should explicitly extend *Gustafson* to Section 11 claims and thereby maintain a narrow platform of standing under Section 11. To permit this Court the opportunity to do this, Defendants respectfully request that this Petition for Writ of Certiorari be granted.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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February 18, 2005

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-15552

D. C. Docket No. 99-01377-CV-JOF-1

APA EXCELSIOR III L.P.,
APA EXCELSIOR III OFFSHORE L.P., *et al.*,

Plaintiffs-Appellants,

versus

PREMIERE TECHNOLOGIES, INC.,
BOLAND T. JONES, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed SEPTEMBER 23, 2004)

Before BLACK and KRAVITCH, Circuit Judges, and STROM*, District Judge. BLACK, Circuit Judge:

This case arose from a stock-for-stock merger between Xpedite Systems, Inc., and Premiere Technologies, Inc.[1]

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* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

[1] Premiere now is known as PTEK Holdings, Inc.

Plaintiffs brought this action against Premiere and some of its directors and officers, asserting 1933 Securities Act and common law claims. On appeal, Plaintiffs challenge the district court's grant of summary judgment in favor of Defendants on Plaintiffs' Section 11 and 15 claims under the 1933 Securities Act,[2] 15 U.S.C. §§ 77k and 77o, and Plaintiffs' common law negligent misrepresentation claims. We reverse as to the Securities Act claims, but affirm as to the negligent misrepresentation claims.

I. BACKGROUND

Plaintiffs are investment funds and individuals who are former shareholders of Xpedite. The Plaintiff Funds, APA Excelsior III L.P., APA Excelsior III Offshore L.P., APA/Fostin Pennsylvania Venture Capital Fund, and CIN Ventures Nominees Limited (collectively, the Plaintiff Funds) were managed by Alan Patricof Associates (APA). Plaintiffs Stuart and David Epstein are brothers who invested in Xpedite as individual investors. Collectively, Plaintiffs held about 30 percent of the stock of Xpedite. Due to the Plaintiff Funds' substantial holdings in Xpedite, a representative from APA, Robert Chefitz, sat on the Xpedite's board of directors. Similarly, due to the Epsteins' holdings in Xpedite, David Epstein sat on the board.

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[2] At oral argument, Plaintiffs expressly abandoned their Section 12 claims. Based on Plaintiffs' representations at oral argument, we consider only their Section 11 claims and in no way express any opinion as to the merits of the Section 12 claims they originally pursued. We further note Section 15 of the 1933 Securities Act provides for liability of controlling persons and thus in this case is derivative of the Section 11 claims. 15 U.S.C. § 77o.

In 1997, Xpedite began to consider strategic alternatives to provide an exit strategy for Xpedite's early investors, which included Plaintiffs. In February 1997, the board appointed a Special Committee, which comprised Chefitz, David Epstein, and Phil Campbell, to evaluate Xpedite's alternatives and to engage advisors.[3]

During this process, Premiere expressed an interest in acquiring Xpedite. On October 31, 1997, Xpedite – through its senior officers, investment banker (Merrill Lynch), accountants (Ernst & Young), and legal counsel (Paul, Hastings, Janofsky & Walker LLP) – began its due diligence investigation of Premiere. The Special Committee, on which Chefitz and David Epstein sat, had oversight responsibility for the due diligence investigation.

On November 13, 1997, Xpedite's board unanimously voted to recommend the merger to Xpedite's shareholders. As a condition of entering into the merger agreement, Premiere required Plaintiffs and others to execute Stockholder Agreements. Under the Stockholder Agreements, Plaintiffs granted irrevocable proxies to Premiere to vote their Xpedite stock in favor of the merger:

> SECTION 1.01 VOTING AGREEMENT. The Stockholder hereby agrees that . . . the Stockholder shall vote (or cause to be voted) the Shares and the Other Securities [in Xpedite] in favor of the Merger [with Premiere]. . . .
>
> . . . .

[3] During his deposition, Chefitz testified he may have been the chair of the Special Committee.

> SECTION 1.02 IRREVOCABLE PROXY. The Stockholder hereby irrevocably appoints [Premiere] and each of its officers . . . to vote and otherwise act (by written consent or otherwise) with respect to the Shares and Other Securities, which the Stockholder is entitled to vote at any meeting of stockholders of the Company. . . .

The Stockholder Agreements were terminable/voidable upon the termination of the Merger Agreement. Premiere also required Plaintiffs (except Stuart Epstein) and others to execute Affiliate Letters, setting forth potential limitations on Plaintiffs' ability to transfer the Premiere stock they would receive upon consummation of the merger. By executing the Affiliate Letters, Plaintiffs acknowledged that a restrictive legend would be placed on the Premiere common stock they received in the merger. Plaintiffs further warranted that they understood Premiere was "under no obligation to file a registration statement with the SEC covering the disposition of [their] shares."

On that same day, the Xpedite and Premiere boards entered into the Merger Agreement, agreeing to a stock-for-stock transaction. Upon the occurrence of certain conditions, either party could terminate the Merger Agreement.

On January 28, 1998, Premiere's Registration Statement for the Xpedite Merger became effective. On February 27, 1998, a majority of Xpedite and Premiere shareholders voted to approve the merger. Upon consummation of the merger, all Xpedite shareholders received 1.165 shares of Premiere common stock. Pursuant to the Merger Agreement, the exchange ratio was determined by reference to the average closing price of Premiere stock for a set period of time.

On June 9 and 10, 1998, Premiere announced it would have a shortfall in its revenues, and that it would be taking a charge against its bad debt reserves. On June 10, 1998, the price of Premiere stock dropped from $14.4375 per share to $10.375 per share, a one-day decline of 28 percent and an overall decline of 69 percent from the $34 per share merger price.

Plaintiffs subsequently filed the complaint in this case, asserting claims for breach of contract, negligent misrepresentation, and violations of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77l, 77o. The district court dismissed the contract claim and certain of Plaintiffs' Securities Act allegations. The district court subsequently granted summary judgment to Defendants on Plaintiffs' remaining Securities Act claims, concluding Plaintiffs lacked standing because they acquired the securities through a private offering and were not the type of investors the Act was meant to protect, and on Plaintiffs' negligent misrepresentation claims, concluding Plaintiffs could not establish they reasonably relied on the alleged misrepresentations. These summary judgment rulings are at issue in this appeal.

II. DISCUSSION

We review de novo a district court's grant of summary judgment. *Physicians Multispecialty Grp. v. Health Care Plan of Horton Homes, Inc.*, 371 F.3d 1291, 1293 (11th Cir. 2004) (citation omitted).

A. *Section 11 Claim*

1. *Standing*

The Securities Act issue presented by this case is whether a plaintiff who committed to a purchase prior to the filing of a registration statement has standing to bring suit under Section 11 for material misrepresentations or omissions in the subsequently filed registration statement. We hold, albeit with some trepidation, *see infra* Part II.A.3., that Plaintiffs do have standing to maintain their Section 11 claims.

At the outset, we emphasize that our consideration of this case is, of course, limited to the issues and arguments actually raised by the parties. *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1445 n.4 (11th Cir. 1998). All we can do is consider the case before us as it has been presented by the parties. Neither side in this dispute has discussed any case addressing the precise issue presented by this case. Despite much time and effort, the Court too has been unable to find a case directly on point. That said, we turn now to the language of the statute and the arguments presented by the parties.

Section 11(a) of the Securities Act provides:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, *any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue. . . .*

> If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

15 U.S.C. §77k(a) (emphasis added). To recover under this section, a plaintiff must be able to trace the security he purchased to the defective registration statement. *Barnes v. Osofsky*, 373 F.2d 269, 271-73 (2d Cir. 1967).

Defendants' primary contention is that Plaintiffs acquired their stock outside the public offering, a registration statement therefore was not required as to the distribution of Premiere stock to Plaintiffs, and Plaintiffs accordingly do not have standing to bring a Section 11 claim.[4] Assuming the validity of the premise underlying Defendants' argument – that even if a plaintiff can trace the shares he acquired to a registration statement, he cannot recover under Section 11 unless the registration

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[4] Defendants also contend Plaintiffs failed to present evidence creating a triable fact as to whether they received registered shares. The district court does not appear to have considered this issue in its summary judgment ruling. Although Defendants' argument seems to be belied by a comparison of the number of shares listed in the registration statement to the total number of Xpedite shares convertible upon consummation of the merger, we leave initial resolution of the issue to the district court on remand.

statement was required as to him[5] – we find the argument without merit because Plaintiffs did acquire their shares of Premiere pursuant to a public offering.[6]

With certain exemptions, it is unlawful for any person to sell a security unless a registration statement is in effect for that security. 15 U.S.C. § 77e(a), (c) (prohibiting sale of unregistered securities); *Id.* § 77d (listing transactions exempted from § 77e). One exemption from the registration requirement is for "transactions by an issuer not involving any public offering," otherwise referred to as the private offering exemption. *Id.* § 77d(2).

In *SEC v. Ralston Purina Co.*, 346 U.S. 119, 73 S. Ct. 981 (1953), the Supreme Court considered the private offering exemption from the registration requirement of the Securities Act of 1933 and stated the applicability of the private offering exemption "should turn on whether the particular class of persons affected need the protection of the Act." *Id.* at 125, 73 S. Ct. at 984. This Court has identified the following nonexhaustive list of factors to serve as guideposts in performing the private offering analysis: "[1] the number of offerees and their relationship to each other and the issuer [and the information available

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[5] Some support for this premise can be found in dicta in the Supreme Court's decision in *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571, 115 S. Ct. 1061, 1067 (1995) (stating that "just as the liability imposed by § 11 flows from the requirements imposed by §§ 5 and 7 providing for the filing and content of registration statements, the liability imposed by § 12(2) cannot attach unless there is an obligation to distribute the prospectus in the first place (or unless there is an exemption)").

[6] We note our analysis also assumes without deciding the validity of Defendants' argument that there were two offerings. We need not resolve this issue because even if there were two offerings, they should be integrated and treated as a single offering.

to the offerees due to that relationship], [2] the number of units offered, [3] the size of the offering, and [4] the manner of the offering." *Doran v. Petroleum Mgmt. Corp.*, 545 F.2d 893, 900 (5th Cir. 1977).[7] Here, the November 1997 offering was made to a few offerees who had a close relationship with Premiere due to their status as insiders of, and early investors in, Xpedite. Plaintiffs had access to inside information and due diligence rights regarding Premiere's acquisition of Xpedite. Although the number of units offered was somewhat large, the manner of the offering weighs heavily towards considering this a private offering. Moreover, the Plaintiff Funds, at least, appear to have been sophisticated investors who could evaluate the information to which they had access. Upon consideration of these factors, had Plaintiffs been the only offerees, the offering would appear to have been private.

The SEC and courts have, however, applied what is referred to as the integration analysis when a private offering is followed by a public offering, or vice versa. Under the integration analysis, multiple offerings may be considered as one integrated public offering. The factors relevant in the integration analysis are: "whether (1) the different offerings are part of a single plan of financing, (2) the offerings involve issuance of the same class of security, (3) the offerings are made at or about the same time, (4) the same type of consideration is to be received, (5) the offerings are made for the same general purpose." Non-Public Offering Exemption, SEC Release No. 33-4552, 27

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[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

Fed. Reg. 11316, 11317 (Nov. 6, 1962); *see also Doran*, 545 F.2d at 901 n.9.

In this case, all factors point toward integration. First, the offering to Plaintiffs and the offering to the public shareholders of Xpedite were part of a single plan of financing – the means by which Premiere would acquire Xpedite through merger. Second, the two offerings involved the issuance of the same class of security. Plaintiffs and the public shareholders received Premiere common stock. Although the stock received by Plaintiffs did include a legend setting out restrictions on its resale, the legend was placed there due to the characteristics of the Plaintiffs, not due to the characteristics of the stock. Third, the two offerings occurred within just two-and-a-half months of each other. The fourth and fifth factors also weigh in favor of integration – the consideration involved was the same for both sets of offerees, as was the purpose of the offer (to effect the merger between Premiere and Xpedite). On this basis, we reject Defendants' argument that the offering was private as to Plaintiffs.[8]

Defendants also contend that since a Section 11 plaintiff must show falsity at the time a registration statement is effective, a plaintiff who makes his investment decision before the registration statement's effective date cannot bring a Section 11 claim. Defendants fail to cite any compelling support for their argument. We therefore reject Defendants' contention.

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[8] We note SEC Rule 152 might be relevant to this analysis. 17 C.F.R. § 230.152. The parties did not, however, raise Rule 152 in their initial briefs to this Court. Although we did request briefing on this issue, we decline to consider it here.

2. *Reliance*

Although Defendants generally suggest the time at which Plaintiffs committed to the acquisition of Premiere stock bars their Section 11 claim, Defendants do not make the related, seemingly more attractive argument that, due to the time of their investment decision, Plaintiffs could not possibly have relied on the registration statement and therefore should not be entitled to maintain their claims under Section 11.

Section 11 does not require a plaintiff to allege and prove he relied on an alleged material misrepresentation or omission unless the plaintiff acquired the security "after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement." 15 U.S.C. §77k(a). "There is a conclusive presumption of reliance for any person purchasing the security prior to the expiration of twelve months." 1 Thomas Lee Hazen, The Law of Securities Regulation §7.3[4], at 587 (4th ed. 2002); *see also Osofsky,* 373 F.2d at 272. Defendants do, however, have an affirmative defense with regard to a plaintiff who acquires the security prior to the availability of the twelve-month earnings statement referred to in the statute. Defendants can prevent recovery by such a plaintiff by showing "that at the time of such acquisition [the plaintiff] knew of such untruth or omission." 15 U.S.C. § 77k(a). Thus, the statute prevents recovery even during the initial period covered by the statute if reliance would have been unreasonable. It is conceivable, therefore, that if a plaintiff committed to an acquisition prior to the filing of a registration statement – if reliance were a complete impossibility under any theory

– he too should not be permitted to recover under Section 11.

Such reasoning was embraced by the court in *Guenther v. Cooper Life Sciences, Inc.*, 759 F. Supp. 1437 (N.D. Cal. 1990). In that case, a registration statement was filed on June 14, 1985. The registration statement was subsequently amended on February 19, 1986. Plaintiffs purported to represent a class of investors who purchased the relevant stock between June 17, 1985 and January 28, 1988. The defendants in that case argued the plaintiffs who purchased stock between the filing of the initial registration statement and the filing of the allegedly misleading amendment did not have standing under Section 11 because they could not trace their securities to a defective registration statement. *Id.* at 1440. The court accepted defendants argument, relying on a regulation addressing post-effective amendments to a registration statement. In so ruling, however, the court pointed out that to rule instead in plaintiffs' favor would "enable investors . . . to bring a section 11 action even though at the time they purchased their shares they could not possibly have relied on misleading registration statements, since none had been filed. Such a result would clearly contravene the purpose of section 11." *Id.; cf. In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 288 (S.D.N.Y. 2003) ("Those who purchase within twelve months after the registration statement becomes effective, and at any time until there is an earning statement 'covering a period of at least twelve months beginning after the effective date of the registration statement' need not prove reliance in order to recover."), *appeal on other grounds granted in part by Hevesi v. Citigroup Inc.*, 366 F.3d 70 (2d Cir. 2004).

Our review of the Senate, House, and Conference reports on Section 11 has turned up no indication that, at the time of enacting Section 11, Congress contemplated a situation like the one presented in this case. For example, there is a statement in 73d Congress, 1st Session H.R. No. 85 on H.R. 5480, at 10 (May 4, 1933) that "[t]he statements for which [potential defendants] are responsible, although they may never actually have been seen by the prospective purchaser, because of their wide dissemination, determine the market price of the security, which in the last analysis reflects those manifold causes that are the impelling motive of the particular purchase." That is, even if a purchaser did not see the alleged misstatements, those misstatements affected the price of the security and therefore motivated the purchase. In a case like the one currently before the Court, the purchaser committed to the sale before the alleged misstatements or omissions were made and therefore before such statements or omissions could have affected the price and played any role in the purchase decision.

Applying this reliance concept is not, however, without difficulty. First, there are those who view Section 11 as not containing "any reference to a requirement, inference or presumption that the plaintiff might have relied on the registration statement," and believe "[r]eliance is not a factor in a § 11 action, and thus impossibility of reliance can be no bar to a § 11 claim." *Westinghouse Elec. Corp. v. '21' Int'l Holdings, Inc.*, 821 F. Supp. 212, 218 (S.D.N.Y. 1993). Second, the statute does not expressly reference reliance until after the requisite twelve-month earnings statement is issued. Third, and most important, is the fact that Defendants did not make the reliance argument in their brief to this Court. They addressed it only obliquely

in a footnote in a supplemental letter brief. We do not consider arguments not raised in a party's initial brief. *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000).[9]

3. *Summary*

Upon consideration of the issues and arguments properly raised by the parties, we hold Plaintiffs do have standing to bring their Section 11 claims and remand for further proceedings on those claims. Our holding today seems consistent with how some commentators characterize the purpose of Section 11 – as being "an in terrorem remedy that would deter violations . . . and encourage careful preparation of the registration statement and prospectus." 2 Harold S. Bloomenthal, Securities Law handbook § 26:28, at 67 (2004 ed.). It is debatable, however, whether our holding is entirely consistent with the purpose this Court has ascribed to the Securities Act of 1933 – to "'protect investors by promoting full disclosure of information thought necessary to informed investment decisions.'" *Doran*, 545 F.2d at 900 (quoting *Ralston Purina Co.*, 346 U.S. at 124, 73 S. Ct. 984). Here, the investment decision was made prior to the filing and effective date of the registration statement.[10] Nonetheless, it is the holding dictated by the parties' presentation of the case.

As we state in the text above, there is no indication that, at the time of enacting the Securities Act of 1933,

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[9] It is possible this reliance concept may, in fact, go to the merits of Plaintiffs' Section 11 claim.

[10] We note there is no allegation that such conduct was impermissible under the Securities Act or under the pertinent SEC rules.

Congress contemplated the factual scenario present in this case. Congress does, of course, have the ability to enact a clarifying amendment squarely addressing the factual circumstances presented by this case.

B. *Negligent Misrepresentation Claim*

The parties dispute whether New York or Georgia law applies to Plaintiffs' negligent misrepresentation claim. To make out a negligent misrepresentation claim under either New York or Georgia law, one of the elements Plaintiffs must establish is that they "reasonably relied" on the alleged misrepresentation. *Hydro Investors, Inc. v. Trafalgar Power, Inc.*, 227 F.3d 8, 20 (2d Cir. 2000) (New York law); *Marquis Towers, Inc. v. Highland Group*, 593 S.E.2d 903, 906 (Ga. Ct. App. 2004) (Georgia law). Because we conclude Plaintiffs' alleged reliance was not reasonable, we need not resolve the choice of law issue here.

The alleged misrepresentations on which Plaintiffs base their negligent misrepresentation claim relate to: Premiere's financial accounting of its dealings with the Telephone Company of Central Florida ("TCCF"), a Premiere calling card customer; account information relating to its customer Touch 1 Communications, Inc., disguising Touch 1's inability to pay its obligations to Premiere; problems with Premiere's calling card platform; Premiere's contract and business dealings with DigiTEC 2000, Inc., a calling card customer; problems with Premiere's new Orchestrate product; disagreement within Premiere as to the length of time it would take to integrate Voice-Tel and VoiceCom into Premiere; and flat or declining future revenue prospects for Premiere's voice messaging business. [*See* BB at 18-20; 46-47.]

The basis of Defendants' summary judgment argument and of the district court's ruling was that, even assuming the fact of the alleged misrepresentations, Plaintiffs could not reasonably have relied on such misrepresentations. We agree.

Where a plaintiff has the means of knowing the truth, due diligence is required. *IFD Constr. Corp. v. Corddry Carpenter Dietz & Zack*, 685 N.Y.S.2d 670, 673 (App. Div. 1999) ("Where a party has means available to him for discovering, 'by the exercise or ordinary intelligence', the true nature of a transaction he is about to enter into, 'he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by a misrepresentation." (quotations and citations omitted)); *H&R Project Associates, Inc. v. City of Syracuse*, 737 N.Y.S.2d 712, 715 (App. Div. 2001) (holding negligent misrepresentation claim "manifestly lacks merit" where plaintiff "was in a position to know" falsity of misrepresentations and therefore any reliance was not reasonable);[11] *Williams v. Fallaize Ins. Agency, Inc.*, 469 S.E.2d 752, 754 (Ga. Ct. App. 1996) (plaintiff attempting to establish reasonable reliance must show she exercised due diligence).

[11] We note, moreover, that "'[w]here sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance.'" *Schlaifer Nance & Co. v. Estate of Warhol*, 119 F.3d 91, 98 (2d Cir. 1997) (quoting *Grumman Allied Indus. v. Rohr Indus., Inc.*, 748 F.2d 729, 737 (2d Cir. 1984)).

Although Plaintiffs had due diligence rights, they failed to exercise them in a meaningful way.[12] For example, Chefitz testified he did not direct anyone to examine Premiere's key calling card customers, he did not negotiate for specific warranties regarding the calling card business, and he did not direct anyone to perform due diligence as to the technical capacity of the calling card business's software platform (but would have expected it to be done by Xpedite's management). We also note that, although Chefitz believed Xpedite's due diligence team had access to Premiere's accounts receivable for the calling card business, Chefitz did not review them himself or direct anyone else to do so.

As for the alleged misrepresentations regarding DigiTEC, Roy Anderson, Xpedite's former CEO, told Chefitz that DigiTEC was important to Premiere's revenues. Chefitz testified, however, that he did not remember doing any due diligence on DigiTEC other than reviewing some of the company's public materials. Chefitz also did not recall directing anyone to make contact with DigiTEC as part of Xpedite's due diligence efforts. Regarding Plaintiffs' allegations that Premiere misrepresented its revenue projections due to its unilateral insertion of a take or pay provision into its contract with DigiTEC, it is evident from the record that if Plaintiffs had contacted DigiTEC during due diligence, they could have learned DigiTEC's understanding of its contract with Premiere.

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[12] Plaintiffs contend that, although Xpedite had access to Premiere information, they did not. This argument is without merit. The Plaintiff Funds had a representative on Xpedite's Board who took part in the due diligence efforts for the merger. Moreover, David Epstein sat on Xpedite's Board and took part in due diligence. He shared the information he received in those capacities with his brother Stuart Epstein.

Not only did Plaintiffs have due diligence rights, but they also were on notice of the potential for many of the problems with Premiere's business about which they now complain. Premiere's public disclosures leading up to the merger agreement put Plaintiffs on notice of the possibility of problems involving Premiere's new Orchestrate product. Premiere noted in a September 1997 SEC filing that "aspects of the Company's Orchestrate product line compete within markets where larger companies are working to provide a unified messaging solution." More generally, Premiere noted that "[d]elays in the introduction of new services, the inability of the Company to develop such new services or the failure of such services to achieve market acceptance could have a material adverse effect on the Company's business, operating results or financial condition." Chefitz testified that he never asked for any demonstration of Premiere's technology.

Premiere's public filing also gave notice of potential problems with integrating new acquisitions. In its September 1997 SEC filing, Premiere stated:

> The Company believes that given the size and fragmented nature of the facilities and businesses of the Voice-Tel Entities and the technical complexity of integrating the Company's products with those of Voice-Tel, the integration process will be particularly complex and has and will place significant demands on the Company's management, engineering, financial and other resources. The successful consolidation of the Voice-Tel Entities and their integration into the Company's operations is critical to the Company's future performance. . . .

> There can be no assurance that the Voice-Tel Entities will be successfully consolidated or integrated with the Company's operations on schedule or at all, that the Voice-Tel Acquisitions will result in net sales or earnings level that would justify the Company's investment therein or the expenses related thereto or that operational synergies will develop as projected. Failure to successfully integrate the Voice-Tel Entities or to achieve operating synergies would have a material adverse effect on the Company's business, financial condition and results of operations.

Robert Chefitz testified he was aware of the integration issues the Voice-Tel acquisition presented. He further acknowledged that due diligence into the integration of Voice-Tel could have included discussions with former franchisees who had become part of the Premiere organization, but admitted he did not conduct such due diligence or direct anyone else to do so.

Premiere also warned in its September 1997 SEC filing of the difficulties it faced in integrating acquisitions in general:

> The Company regularly evaluates acquisition opportunities and intends to grow in substantial part through acquisitions of complementary services, products, technologies or businesses. Acquisitions may result in potentially dilutive issuances of equity securities, the incurrence of additional debt, the assumption of known and unknown liabilities, the write-off of software development costs and the amortization of expenses related to goodwill and other intangible assets, all of which could have a material adverse effect on the Company's business, operating results or financial condition. . . . Acquisitions also involve

> numerous additional risks, including difficulties in the assimilation of the operations, services, products and personnel of the acquired company, the diversion of management's attention from other business concerns, entering markets in which the Company has little or no direct prior experience and the potential loss of key employees of the acquired company.

Premiere's September 1997 SEC filing also provided notice that problems could arise due to the nature of Premiere's licensees:

> The Company's success depends in part upon the ultimate success or failure of its licensees. The telecommunications industry is intensely competitive and rapidly consolidating. The majority of companies that have chosen to outsource communications card services to Premiere are small or medium-sized telecommunications companies that may be unable to withstand the intense competition in the telecommunications industry. During the past 12 months, one licensee, in addition to CNC, ceased doing business with the Company primarily due to financial difficulties. Licensees that ceased doing business with Premiere due to financial difficulties contributed in the aggregate approximately $2.9 million of Premiere's 1996 revenues. . . . [T]here can be no assurance that the failure of one or more of the Company's licensees to develop and sustain a market for the Company's services, or termination of one or more of the Company's licensing relationships, will not have a material adverse effect on the Company's business, operating results or financial condition.

It is evident Plaintiffs were on notice of many of the problems relating to the alleged misrepresentations and failed to conduct adequate due diligence. There is no basis on which a fact finder could conclude Plaintiffs' reliance on the alleged misrepresentations was reasonable. Plaintiffs nevertheless contend they should be permitted to rely on the due diligence performed by their experts and therefore should be deemed to have satisfied the reasonable reliance element of their negligent misrepresentation claim. Of course, Plaintiffs should be able to rely on their experts. But if their experts failed in conducting due diligence, Plaintiffs' recourse should be against the experts, not against the Defendants.

Based on the facts disclosed to Plaintiffs putting them on notice of potential problems and on their inadequate due diligence efforts, we conclude Plaintiffs failed to present evidence from which a fact finder could find Plaintiffs reasonably relied on the alleged misrepresentations.

III. CONCLUSION

We hold that, as this case has been presented to the Court, Plaintiffs do have standing to maintain their Section 11 claims. As to Plaintiffs' negligent misrepresentation claims, however, we hold Plaintiffs failed to present evidence from which a reasonable fact finder could find in their favor on the reasonable reliance element of their claims.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

APA EXCELSIOR III L.P., *et al.*, Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 1:99-CV-1377-JOF
PREMIERE TECHNOLOGIES, INC., *et al.*, Defendants.	:	

ORDER

(Filed Sept. 26, 2003)

This matter is before the court on Defendants' motion for summary judgment [150-1].

I. Background

A. Procedural History and Facts

Plaintiffs,[1] former shareholders of Xpedite Systems, Inc. ("Xpedite"), filed the instant lawsuit against Defendants, Premiere Technologies, Inc. ("Premiere"); Boland Jones, ("B. Jones"), Premiere's President and Chairman of the Board; Patrick Jones ("P. Jones"), Premiere's Vice-President for Finance and Legal; George W. Baker, Sr. ("Baker"), one of Premiere's Directors; Eduard J. Mayer

[1] The Plaintiff Funds are APA Excelsior III L.P., APA Excelsior III Offshore L.P., APA/Fostin Pennsylvania Venture Capital Fund, and CIN Venture Nominees Limited. Stuart A. Epstein and David Epstein are individual Plaintiffs.

("Mayer"), another Director; and Raymond H. Pirtle ("Pirtle"), also a Director, on November 4, 1998 in the United States District Court for the Southern District of New York. Plaintiffs alleged the following causes of action: (1) breach of contract against Premiere, (2) negligent misrepresentation against all Defendants, (3) violations of Section 11 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. § 77k, against all Defendants, (4) violations of Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2) against all Defendants, and (5) violations of Section 15 of the Securities Act, 15 U.S.C. § 77o against the individual Defendants. On May 19, 1999, the Honorable Allen G. Schwartz transferred Plaintiffs' suit to this court because of the factual and legal similarities between this case and twenty-two consolidated class action lawsuits previously filed against Premiere and styled *In re Premiere Tech., Inc. Sec. Litig.*, Civil Action No. 1:98-CV-1804-JOF (N.D. Ga.).

Plaintiff Funds ("the APA Funds") are managed under Alan Patricof's company, APA. Robert Chefitz, an employee of APA and a limited partner of the general partner of each of the Plaintiff Funds, monitored the APA Funds' investments in Xpedite. Plaintiffs Stuart Epstein and David Epstein are brothers who invested in Xpedite as individual investors. Mr. Chefitz and David Epstein held seats on the Board of Directors of Xpedite. At the time of the merger between Xpedite and Premiere, the APA Funds owned 19.7% of the outstanding shares of Xpedite; Plaintiff David Epstein owned 6.1%; and Plaintiff Stuart Epstein less than 3%.

Xpedite provides enhanced facsimile transmission services. In early 1997, Xpedite began considering the possibility of merger with another company. In February 1997, members of Xpedite's senior management and

certain financial institutions ("the MBO Group") offered to buy Xpedite for $22.50 per share. At the same time, Xpedite's Board of Directors formed a Special Committee to consider the alternatives. Mr. Chefitz was appointed to head the Special Committee, and David Epstein was appointed to be a member of the Special Committee. The Special Committee hired Merrill Lynch, Pierce, Fenner & Smith ("Merrill Lynch") to assist it in the process. Xpedite also hired Ernst & Young LLP ("Ernst & Young") and Paul Hastings, Janofsky & Walker LLP ("Paul Hastings") to advise it. After receiving the offer from the MBO Group, the Special Committee instructed Merrill Lynch to solicit additional offers for Xpedite. In August, the MBO Group raised its bid twice, and the Special Committee accepted the MBO Group's offer of $23.25 per share. In connection with this offer, Xpedite agreed to purchase the outstanding shares of certain European affiliates of Xpedite. The European transaction apparently proceeded, despite the fact that Xpedite eventually declined the MBO Group's acquisition offer.

In late October 1997, Premiere Technologies, Inc. (n/k/a PTEK Holdings, Inc.) ("Premiere"), expressed an interest in acquiring Xpedite. The parties eventually agreed upon a stock-for-stock transaction that placed a $34.00 per share price on Xpedite's stock. As a condition to the execution of a Merger Agreement between Xpedite and Premiere, Premiere required that Plaintiffs, as well as certain other Xpedite shareholders, execute Stockholder Agreements. On November 14, 1997, Premiere announced that it had signed a definitive agreement by which it acquired Xpedite for $34.00 per share in a stock-for-stock merger.

On January 28, 1998, Premiere filed with the Securities & Exchange Commission a Registration Statement for the issuance of Premiere common stock to Xpedite shareholders in connection with the merger of Xpedite and Premiere. The next day Premiere disseminated a Prospectus to Xpedite shareholders as part of the Registration Statement. The Prospectus contained various statements about Xpedite's acquisitions and integration of those acquisitions. The Prospectus also contained information about a product called Orchestrate, intended to be a comprehensive suite of integrated communications services that Premiere publicly launched on June 24, 1997. Xpedite's shareholders approved the acquisition by Premiere in a vote on February 27, 1998.

On June 10, 1998, Premiere issued a press release announcing an expected after-tax loss of between $0.07 and $0.11 per share for the quarter due to the financial difficulties of two customers, as well as costs and one-time charges related to Orchestrate.com, a new subsidiary, and increased costs related to the company's acquisition growth. That day, Premiere common stock dropped from $14.4375 per share to $10.375 per share, a decline of 28% and a 69% drop from the $34.00 Plaintiffs received in the Merger. At the time Plaintiffs filed their complaint, Premiere common stock was trading at approximately $5.00 per share.

In their complaint, Plaintiffs contend that in connection with the Stockholder Agreement, Premiere and its representatives caused materially false and misleading financial information and operational data to be conveyed to Xpedite, Plaintiffs, and their respective advisors and representatives, concerning generally Premiere's valuation, various prior acquisitions of Premiere and Premiere's

integration of those acquisitions, and the projected growth and profitability of Premiere. Plaintiffs also allege that the statements contained in the Registration Statement and Prospectus were materially false and misleading when issued because they misrepresented or omitted Premiere's difficulty in integrating the Voice-Tel and VoiceCom acquisitions, as well as overstating the capabilities of the Orchestrate product and the future viability of Premiere's business.

In an order dated February 28, 2000, the court dismissed Plaintiffs' claims based on corporate mismanagement under the "*Sante Fe* doctrine" which counsels that claims grounded in corporate mismanagement are not cognizable under federal securities laws. *See Sante Fe Industries, Inc. v. Green,* 430 U.S. 462, 477 (1977).[2] The court rejected Defendants' defenses based on hindsight, the "bespeaks caution" doctrine, the statutory safe harbor provisions under the PSLRA, and control person liability

[2] These claims include allegations that (1) Premiere lacked an effective plan for integrating and consolidating Voice-Tel; (2) Premiere significantly reduced staffing at Voice-Tel in an effort to reduce costs, thereby limiting customer service; (3) Premiere attempted to consolidate the billing for various Voice-Tel franchises by reducing the number of billing offices, resulting in a decline in customer service; (4) Premiere's attempt to cut costs at Voice-Tel caused a decline in revenues, margins, and earnings; (5) Premiere's efforts to reduce and eliminate costs at Voice-Tel were ineffective, and Premiere lacked the management information systems to ascertain the full extent of its expenses; (6) Premiere lacked an effective plan for integrating and consolidating VoiceCom; (7) Premiere's plans to cross-sell its products to VoiceCom's Fortune 500 customers was unrealistic; (8) Premiere lacked sufficient internal controls to manage its growth and integrate its acquisitions; (9) Premiere lacked the management capability to implement its strategy for growing and integrating its acquisitions; and (10) Premiere lacked sufficient internal processes for assessing properly the credit risk of its customers.

under section 15, and allowed Plaintiffs' other securities claims to proceed. With respect to Plaintiffs' state law claims, the court dismissed Plaintiffs' breach of contract claims because Plaintiffs were not parties or third-party beneficiaries to the Merger Agreement, nor could Plaintiffs claim standing by reading the Stockholder Agreement in conjunction with the Merger Agreement. The court, however, allowed Plaintiffs' negligent misrepresentation claim to proceed.[3] During the course of discovery, on August 23, 2001, Plaintiffs dismissed without prejudice Individual Defendant Eduard J. Mayer. On January 23, 2002, the court granted Plaintiffs' motion to compel mediation. Mediation was unsuccessful and discovery continued. On October 17, 2002, Defendants filed the instant motion for summary judgment.

B. Contentions

Defendants contend that Plaintiffs do not have standing to raise claims under Sections 11 and 12 of the Securities Act of 1933 because they did not acquire Premiere stock pursuant to a public offering but rather had independent professional advisors and access to inside information about Premiere. Defendants also contend that Plaintiffs' negligent misrepresentation claim fails because Plaintiffs cannot establish justifiable reliance due to the merger clause in the Stockholder Agreements and the failure of Plaintiffs to engage in effective due diligence.

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[3] On February 7, 2001, the court granted Defendants' motion to consolidate this litigation with *In re Premiere Tech., Inc. Sec. Litig.*, Civil Action No. 98-CV-1804-JOF, for the purposes of discovery. On April 18, 2002, the class action parties reached a settlement and the court approved the final settlement agreement on July 8, 2002.

Plaintiffs respond that Defendants do not contest the materially false and misleading misrepresentations and omissions of facts made by Defendants, but rather reargue the standing issues raised by Defendants in their motion to dismiss and rejected by the court. Plaintiffs argue that any party who receives stock pursuant to a filed registration statement and prospectus has standing to raise claims under Sections 11 and 12. Plaintiffs further contend that New York or Delaware law applies to their negligent misrepresentation claim – not Georgia law – and under the proper law, a merger clause in a contract does not bar an action for negligent misrepresentation. Moreover, Plaintiffs aver that they never had any due diligence rights and that any failure of theirs to conduct due diligence does not bar their negligent misrepresentation claim.

II. Discussion

A. Negligent Misrepresentation

Plaintiffs contend that in connection with the Stockholder Agreements, Defendants caused certain financial information and operational data to be conveyed to Plaintiffs that was materially false and misleading. Plaintiffs assert this information induced them to execute the Stockholder Agreements and consent to the terms of the Merger Agreement. Specifically, Plaintiffs argue that Premiere did not advise Xpedite of (1) existing operational problems in integrating Voice-Tel and VoiceCom, (2) the status of Orchestrate, (3) Premiere's problems with calling card customers, and (4) DigiTEC 2000, Inc.'s likely failure to meet Premiere's revenue expectations. Plaintiffs do not contend there were any misrepresentations or omissions in the Stockholder Agreements themselves. Before addressing Plaintiffs' allegations, the court must first determine

which state's law applies to Plaintiffs' negligent misrepresentation claim.

1. Choice of Law

Plaintiffs contend that New York law applies to their claims and Defendants contend Georgia law applies.[4] Plaintiffs pled only federal question jurisdiction in their complaint. *See* Cmplt., ¶ 3. As such, the court exercises supplemental jurisdiction over Plaintiffs' state law claims based on diversity jurisdiction. In diversity cases, a federal court generally looks to the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). Supplemental state law claims in a case where jurisdiction is based on a federal question are also decided with reference to the choice of law provisions of the state in which the district court sits. *See BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir. 1999). However, when a defendant seeks and obtains a transfer of venue pursuant to 28 U.S.C. § 1404(a) for convenience – and not jurisdictional – purposes, the district court must apply the choice of law rules for the forum in which the plaintiff originally brought the action. *See Van Dusen v. Barrack*, 376 U.S. 612 (1964); *Boardman Petroleum, Inc. v. Federated Mutual Insurance Co.*, 135 F.3d 750, 752 (11th Cir. 1998). Here, the Honorable Allen G. Schwartz granted Defendants'

[4] Both parties appear to recognize the possibility that Delaware law would apply to Plaintiffs' claims because the Stockholder Agreements contain Delaware choice of law clauses. But, as the court explained in its previous order, the elements of a negligent misrepresentation claim are similar under both New York and Delaware law. *See* Order, at 30 n.9.

motion to transfer venue under 28 U.S.C. § 1404(a) based on convenience and the interest of justice due to the class action litigation against Defendants that had already been initiated in this court when Plaintiffs filed suit in New York. As such, venue was not transferred for jurisdictional issues. Accordingly, the court must apply the choice of law principles of New York to Plaintiffs' negligent misrepresentation claim.

Under New York choice of law rules governing torts, the court must conduct an "interest analysis" which instructs that a court should apply the law of the jurisdiction having the greatest interest in the litigation. *See The Mark Andrew of the Palm Beaches v. GMAC Commercial Mortgage,* 265 F. Supp. 2d 366, 377 (S.D.N.Y. 2003) (citing *Lazard Freres & Co. v. Protective Life Insurance Co.,* 108 F.3d 1531, 1539 n.5 (2d Cir. 1997)). In torts considered "conduct regulating," New York law applies the law of the place of the tort. *Id.* Negligent misrepresentation is a "conduct regulating" tort. *Id.* at 378 (citing *Geneva Pharmaceutical Technology Corp. v. Barr Laboratories,* 201 F. Supp. 2d 236, 287 n.32 (S.D.N.Y. 2002)). The place of the tort is "the place where the alleged injury is inflicted, rather than where the actions causing the injury originated." *Id.* Here, the court finds that of the Plaintiffs, the APA Funds, located in New York, collectively held the most number of shares in Xpedite, and thus, comparatively, New York has the greatest interest in the litigation. Accordingly, the court applies New York law to Plaintiffs' negligent misrepresentation claim.

Under New York law, the elements of a negligent misrepresentation claim are "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that

he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." *Hydro Investors, Inc. v. Trafalgar Power Inc.*, 227 F.3d 8, 20 (2d Cir. 2000). Defendants moved for summary judgment on the reasonable reliance element only contending that Plaintiffs cannot establish justifiable reliance because of the merger clause in the Stockholder Agreements and because Plaintiffs failed to engage in sufficient due diligence.

2. Merger Clause

Defendants first contend that Plaintiffs' negligent misrepresentation claim fails because Plaintiffs cannot demonstrate reasonable reliance in light of the integration clause contained in the Stockholder Agreement. The Stockholder Agreement provides that "[t]his Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof and supercedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject hereof." Stockholder Agreement, Section 6.02. Numerous courts applying New York law have held that a merger clause, standing alone, cannot preclude reasonable reliance as a matter of law.[5] *See, e.g., Harsco Corp. v. Segui*, 91 F.3d 337,

[5] The element of reasonable reliance necessary *inter alia* to prove claims of fraud, fraudulent inducement and negligent misrepresentation is analyzed similarly in each of these causes of action. *See Emergent Capital Investment Management LLC v. Stonepath Group, Inc.*, 2003 WL 22053957, ___ F.3d ___ (2d Cir., Sept. 4, 2003) (utilizing same reasonable reliance standard for '34 Act and common law fraud claims);

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343-48 (2d Cir. 1996); *Consolidated Edison, Inc. v. Northeast Utilities,* 249 F. Supp. 2d 387, 401-03 (S.D.N.Y. 2003); *Emergent Capital Investment Management LLC v. Stonepath Group, Inc.,* 195 F. Supp. 2d 551, 562 (S.D.N.Y. 2002), *rev'd in part on other grounds, Emergent Capital Investment Management LLC v. Stonepath Group, Inc.,* 2003 WL 22053957, ___ F.3d ___ (2d Cir., Sept. 4, 2003). If a merger clause is accompanied by some other disclaimer specifically referencing the investigation undertaken or the fact that certain representations or warranties were not made, then a plaintiff's claim may be barred. *See Dannan Realty Corp. v. Harris,* 5 N.Y.2d 317, 319-20 (1959) (where party specifically disclaims reliance on representation in contract, party cannot assert it was fraudulently induced to entered into contract based on the representation it disclaimed). Here, however, there were no specific warranties or representations in the Stockholder Agreement, and cases cited by Defendants are distinguishable for this reason. *See, e.g., Simms v. Biondo,* 816 F. Supp. 814, 823 (E.D.N.Y. 1993) (merger clause references investigation). Thus, the merger clause alone does not bar Plaintiffs' negligent misrepresentation claim.

3. Other Circumstances

Under New York law, however, the analysis does not end with consideration of an integration clause or specific disclaimer of representations. Instead, the reasonableness of a plaintiff's reliance is assessed by considering "the

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Consolidated Edison, Inc. v. Northeast Utilities, 249 F. Supp. 2d 387, 408-09 (S.D.N.Y. 2003) (rejecting the plaintiffs fraudulent inducement and negligent misrepresentation claims under the same reasonable reliance analysis barring the plaintiff's fraud claim).

entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them." *See Emergent Capital Investment Management LLC v. Stonepath Group, Inc.*, 2003 WL 22053957, at *4, ___ F.3d ___ (2d Cir., Sept. 4, 2003). These factors have been applied in a variety of contexts. In *Lazard Freres & Co. v. Protective Life Insurance*, 108 F.3d 1531 (2d Cir. 1997), the plaintiff, an investment bank and registered broker-dealer, sued the defendant insurance company under a breach of contract theory over defendant's purported agreement to purchase a $10 million bank debt. The plaintiff's agent encouraged the defendant's representative to agree immediately to purchase the debt because a report would soon be publicly issued that showed 20% of the face value of the debt would be paid shortly and there were no other circumstances that would reduce the value of the debt. *Id.* at 1534. After the closing documents had been prepared, the defendant finally read the report and concluded that the plaintiff had misrepresented its contents. The defendant refused to close the deal, forcing the plaintiff to find another buyer at a much lower price, and the plaintiff filed suit. In considering its affirmative defenses, the court determined that the defendant could not justifiably rely on the plaintiff's oral representations because the defendant was a sophisticated business party and thus, operated "under a further duty to protect itself from misrepresentation" through investigation. *Id.* at 1543.

In *Grumman Allied Industries, Inc. v. Rohr Industries, Inc.*, 748 F.2d 729 (2d Cir. 1984), Grumman alleged that Rohr failed to disclose material facts relating to the testing of a bus known as Model 870 during acquisition negotiations between Grumman and a subsidiary of Rohr. The

court first concluded that specific disclaimers in the acquisition agreement were fatal to Grumman's negligent misrepresentation claims. The court also rejected Grumman's argument that it reasonably relied on Rohr's representations concerning the Model 870 bus "in light of undisputed evidence demonstrating that Grumman enjoyed unfettered access to [defendant's] plants, personnel and documents; and that it possessed the legal, technical and business expertise necessary to make effective use of that access." *Id.* at 737. "Where sophisticated businessmen engaged in major transactions enjoy access to critical information but fail to take advantage of that access, New York courts are particularly disinclined to entertain claims of justifiable reliance." *Id.* (citing *Marine Midland Bank v. Palm Beach Moorings, Inc.*, 61 A.D.2d 927, 928, 403 N.Y.S.2d 15, 17 (1st Dept.1978) (finding no reasonable reliance where plaintiff had access to corporate records necessary to confirm or disprove the substance of the verbal assurances)). The court also noted that Grumman had been "represented by a sophisticated group of counsel, executives and engineers" and "despite its knowledge that the Model 870 was undergoing endurance testing in late 1977, Grumman neither inquired into the results of that testing, nor asked to scrutinize testing reports." *Id.* at 729.

In *Consolidated Edison Inc. v. Northeast Utilities*, 249 F. Supp. 2d 387 (S.D.N.Y. 2003), plaintiff, Con Edison, sued the defendant for fraud and negligent misrepresentation after a multibillion dollar merger failed, alleging that oral statements made during the due diligence process contained material misrepresentations. Con Edison argued that the defendant failed to disclose the nature of a supply contract that Select, the defendant's unregulated energy marketing subsidiary, signed with another retail

power company. In addition to noting various disclaimers and integration clauses in the merger agreement, the court found that Con Edison could not establish justifiable reliance because it was a sophisticated party represented by sophisticated legal and financial advisors and had the opportunity throughout the due diligence process to obtain information about Select. *Id.* at 405. The court also noted that Con Edison had not "demonstrated that it made sufficient efforts to obtain the type of information about Select and [the defendant's] risk management policies that it now claims were integral to the decision to merge" with the defendant. *Id.*

Here, in their 244-paragraph statement of material facts, Plaintiffs recite the statements they believe to be material misrepresentations and the facts that Plaintiffs contend Defendants knew at the time they made the alleged misrepresentations. For the purposes of this motion, however, the court – and Defendants themselves, for that matter – takes all of those allegations as true. Defendants move for summary judgment solely on the element of reasonable reliance. Thus, the representations themselves are not particularly relevant to the court's analysis of reasonable reliance. Plaintiffs nowhere proffer evidence to show that they engaged in sufficient due diligence or that they were denied access to materials during the due diligence process. Instead, Plaintiffs primarily argue that they did not have any due diligence rights, but Xpedite did. The court disagrees. Plaintiffs were the major shareholders in Xpedite. The individual managing the Plaintiff APA Funds, Robert Chefitz, sat on the Board of Directors of Xpedite and chaired the Special Committee appointed to consider offers made to Xpedite

for merger. Mr. Chefitz also supervised the due diligence process. Plaintiff David Epstein sat on the Special Committee and participated in at least one due diligence meeting. Plaintiffs do not contend that Xpedite, itself, barred them from any access to due diligence materials. To contend that only Xpedite, and not Plaintiffs, was able to conduct due diligence splits too fine a hair. Plaintiffs also contend that they, themselves, did not actually engage in the due diligence and hired outside consultants to do that work for them. This fact, however, does not relieve them of the requirement to satisfy the justifiable reliance element of their negligent misrepresentation claim. Furthermore, the manager of APA Funds directed the due diligence efforts and was aware of the information produced during that process. *See* Chefitz Depo., at 99-100 (testifying that he apprised himself of the information received in the due diligence process) and *id.* at 150 (testifying that he directed the "efforts of the various professionals who were assisting in due diligence").

Plaintiffs admit that Premiere provided the due diligence team with both public and confidential financial information. Xpedite's Due Diligence Team, including David Epstein and Robert Chefitz, also met in Atlanta with Premiere's senior officers, including Boland Jones, Jeff Allred, and Patrick Jones, on November 4, 1997. At that meeting, Premiere presented financial information on Premiere's calling card business, Voice-Tel and VoiceCom, and Orchestrate. Additional financial information was also transmitted to Merrill Lynch. As of November 13, 1997, Xpedite's management attended Premiere's management meetings, had a "dialogue about the ongoing affairs of the business," and were "privy to information about the day-to-day operations of the business and the plans for the

business." Chefitz Depo., at 218-19. Thus, by Plaintiffs' own admissions, they had access to due diligence information. Because the court finds that Plaintiffs had the benefits of the due diligence process, the court next addresses the due diligence efforts themselves in light of the fact that Premiere's public filings warned of difficulties in each of the areas in which Plaintiffs complain misrepresentations were made.

Premiere's Registration Statement warned of the risks involved in integrating new acquisitions. *See* September 26, 1997 Form S-3, at 9, 11 ("The Company believes that given the size and fragmented nature of the facilities and businesses of the Voice-Tel Entities and the technical complexity of integrating this Company's products with those of Voice-Tel, the integration process will be particularly complex and has and will place significant demands on the Company's management, engineering, financial, and other resources. The successful consolidation of the Voice-Tel Entities and their integration into the Company's operations is critical to the Company's future performance. . . . There can be no assurance that the Voice-Tel Entities will be successfully consolidated or integrated with the Company's operations on schedule or at all, that the Voice-Tel Acquisitions will result in net sales or earnings level [sic] that would justify the Company's investment therein or the expenses related thereto or that operational synergies will develop as projected."). Mr. Chefitz also testified that he understood the integration process would be a "substantial task." *See* Chefitz Depo., at 166. Mr. Chefitz stated:

> Q: And that [integration of Voice-Tel) would have been a risk attendant to whether or not integration could be accomplished successfully, correct?

MR. WEISS: Objection.

A: It would have been a risk which – at the time Premiere and Xpedite entered into its agreement. There would be ample time to identify how well that integration was going or not going.

Q: And that would have been a subject that could have been covered in due diligence, correct?

A: Correct.

Q: And due diligence into the success of the integration of Voice-Tel could have included discussions with the various former franchisees who were now part of the Premiere organization, often as employees, correct?

A: Correct.

MR. WEISS: Objection.

Id. at 166-67. Mr. Chefitz, however, did not have any discussions with former Voice-Tel franchisees about the integration efforts, nor did he direct anyone to undertake such an investigation. *Id.* at 168. He assumed Xpedite "management would have had those conversations." *Id.*

Similarly, Premiere noted in its public filings that there might be difficulties with the development of Orchestrate. *See* September 26, 1997 Form S-3, at 11-12, 18, 23-24 (noting that Orchestrate's product line competed in markets where larger companies were working on establishing a unified messaging solution and that the failure of Orchestrate to come to the market successfully could have materially adverse impact on Premiere's business). Mr. Chefitz also testified that there were no representations or warranties made to him regarding whether Orchestrate would ever reach the market. *See* Chefitz Depo., at 175-76.

However, there is no evidence in the record that any person from Plaintiffs' due diligence team even asked to see the Orchestrate technology.

In its Form S-3, Premiere also warned that the financial viability of its customers could impact Premiere's business by noting that the "majority of companies that have chosen to outsource communication card services to Premiere are small or medium-sized telecommunications companies that may be unable to withstand intense competition in the telecommunications industry . . . , there can be no assurance that the failure of one of more of Premiere's licensees to develop and sustain a market for Premiere's services, or termination of one or more of Premiere's licensing relationships, will not have a material adverse effect on Premiere's business, financial conditions and results of operations." *Id.* at 21. Mr. Chefitz also testified that the risks that Premiere's customers might face financial difficulty were disclosed prior to the merger. *See* Chefitz Depo., at 183-86. With respect to other aspects of the calling card business, Mr. Chefitz testified that during the due diligence process he spoke with executives in the telecommunications industry who discussed with him the pricing pressures in the calling card industry. *See id.* at 163-65 (executives "expressed concern that it was a competitive market and getting increasingly competitive"). Despite an awareness of these risks, Mr. Chefitz testified that he could not recall directing anyone on the due diligence team to contact Premiere's customers. *See id.* at 156-57. Although his due diligence team had access to Premiere's accounts receivable for the calling card business, he did not review them or direct others to do so. *Id.* at 162-63. Further, he did not seek through negotiation to have

any specific warranties related to the calling card business in the agreements signed with Premiere. *Id.* at 157.

Roy Andersen, Xpedite's former Chief Executive Officer, informed Mr. Chefitz of the importance of DigiTEC to Premiere's revenues and of his concerns about DigiTEC's financial viability. *See id.* at 151-52 (testifying that Andersen told him that DigiTEC was an "important part" of Premiere's revenues and discussed with him whether "DigiTEC was financially healthy enough to make good on the relationship it had with Premiere"). In describing the due diligence efforts made with respect to DigiTEC, however, Mr. Chefitz testified that DigiTEC "was a public company and we had some of its public materials, public information. I don't remember doing anything more than that. Whether [Roy Andersen] did or not, I don't know." *Id.* at 152. Mr. Chefitz testified that he could not recall instructing anyone to make "direct contact with DigiTEC and [conduct] due diligence of their financial stability and ability to perform under the contract." *Id.* at 155.

As the plaintiffs in *Lazard Freres, Grumman,* and *Con Edison,* the court finds that Plaintiffs here had notice of potential problems for Premiere through the description of integration activities, Orchestrate development, and customer viability, in the September 26, 1997 Form S-3 statements. Furthermore, Xpedite's own employee, Roy Andersen, informed Mr. Chefitz that there were potential problems with the financial viability of DigiTEC, one of Premiere's major customers. Plaintiffs also had access to corporate records necessary to confirm or disprove the substance of the verbal assurances made to them during the due diligence process. Despite this, Plaintiffs have not proffered any evidence to dispute Defendants' contention that Plaintiffs' due diligence efforts were unsatisfactory.

Plaintiffs complain that the deposition testimony cited to by Defendants does not tell the complete story because Mr. Chefitz only supervised the due diligence efforts and Defendants did not take the depositions of every member of the due diligence team from Merrill Lynch, Paul Hastings, and Ernst & Young. Plaintiffs, however, fail to offer any evidence to rebut Defendants' proffered testimony concerning the level of due diligence efforts made by Plaintiffs. Plaintiffs, for example, do not point the court to any testimony by anyone on the due diligence team that shows Plaintiffs attempted to investigate the integration of Voice-Tel and VoiceCom, the technology of Orchestrate, the financial viability of Premiere's calling card customers, or DigiTEC. Plaintiffs point only to the fact that Mr. Chefitz directed the Chief Technical Officer of Xpedite, Dennis Schmaltz, to evaluate Premiere's software platform for the calling card business, *see* Chefitz Depo., at 108. This mere direction, however, is irrelevant to an analysis of whether Plaintiffs engaged in due diligence sufficient to establish reasonable reliance. Significantly, Plaintiffs also do not contend that Premiere refused them access to information during the due diligence process that could have uncovered the financial realities. *See id.* at 197-201 (no one from Paul Hastings, Xpedite management, Ernst & Young, or Merrill Lynch informed Chefitz that due diligence information was withheld).[6]

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[6] In their Statement of Material Facts, Plaintiffs contend that their due diligence team did not have "access" to information concerning Premiere's relationship with DigiTEC, TCCF, Orchestrate, and the Voice-Tel/VoiceCom integration. *See* Plaintiffs' Response to Defendants' Statement of Material Undisputed Facts, ¶ 6. The portions of the record they cite for this proposition, however, have nothing to do with "access" and are, themselves, unsupported allegations that Premiere did not

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In a conclusory manner, Plaintiffs do contend in their response to Defendants' motion for summary judgment that even if they had engaged in extensive due diligence, they would not have been able to uncover the misrepresentations made by Defendants. *See In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279. (E.D.N.Y. 2002) (suggesting that futility of due diligence efforts could impact court's analysis because a plaintiff might have no means of discovering "the real quality of the subject of the representation"); *DIMON, Inc. v. Folium, Inc.*, 48 F. Supp. 2d 359, 369-69 (S.D.N.Y. 1999) (denying motion to dismiss because plaintiff alleged that accurate financial information was hidden by means of elaborate scheme whereby balances in accounts were shown by fraudulently generated accounts receivable which were "paid" near the time of the closing of the sale). However, Plaintiffs do not provide any support for this bald contention. Nonetheless, the court considers Plaintiffs' specific allegations of misrepresentations to determine whether they are of the nature that would render even sufficient due diligence efforts futile.

Plaintiffs contend that Defendants made material misrepresentations about Premiere's financial condition knowing that Premiere's calling card platform (1) was not fully functional and customers consistently asked for credits from Premiere, (2) could not handle the calls required to maintain Premiere's forecasted revenues, and (3) caused Premiere to pull employees from the Orchestrate project to

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"disclose" this information. *See* Plaintiffs' Statement of Material Facts, ¶¶ 114, 162, 192, 216, and 236. The relevant legal analysis surrounds whether Plaintiffs engaged in sufficient investigation such that they could reasonably rely on Defendants' statements, not whether Defendants "disclosed" this information.

repair the calling card platform. Plaintiffs also aver that Defendants were aware Premiere required cash deposits from the Telephone Company of Central Florida ("TCCF"), one of its customers, because Premiere was worried about TCCF's financial viability. Plaintiffs next point to the fact that Premiere projected $8 million in revenues for Orchestrate when Premiere did not have a plan or funds in place to develop Orchestrate. Similarly, Premiere projected revenue from its voice messaging system to grow 12% in 1998 when Premiere allegedly knew integration of Voice-Tel/VoiceCom sales force was going to take two years, Voice-Tel sales personnel were leaving and Premiere's internal documents showed future voice messaging revenue would be flat or declining.

The court finds that facts such as these are not uniquely within the possession of Premiere, particularly when Plaintiffs admit that Premiere turned over public and confidential financial information during the due diligence process, Defendants did not restrict the access of Plaintiffs to such information, and many of Plaintiffs' complaints concern the financial viability of Premiere's customers, a matter certainly not exclusively within the province of Premiere's knowledge. There is no scheme or artifice here, like the court described in *CINAR,* that would have prevented Plaintiffs from discovering these issues through their own investigation.[7]

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[7] Plaintiffs set forth two allegations that at first blush might appear to be more difficult to learn through investigation. First, Plaintiffs contend that Premiere inserted "take or pay provision" into its agreement with DigiTEC in order to bolster revenues after DigiTEC had signed the agreement and without DigiTEC's knowledge. *See* Plaintiffs' Response, at 34 (citing Plaintiffs' Statement of Facts, ¶¶ 105, 107-09). Plaintiffs do not explain why this added provision, contained in

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In sum, the court finds that under New York law, Plaintiffs cannot establish reasonable reliance on Defendants' alleged misrepresentations because Plaintiffs had notice of risk factors related to the areas in which they contend Defendants provided inaccurate information; Plaintiffs are sophisticated parties and were represented by sophisticated legal and financial advisors; and Plaintiffs had access to information through the due diligence process, but did not seek information related to the areas of concern and did not negotiate specific warranties or representations from Premiere concerning these issues. Accordingly, the court GRANTS Defendants' motion for summary judgment with respect to Plaintiffs' negligent misrepresentation claim.[8]

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the "Revised September 26 Agreement," could not have been discovered through the due diligence process had Plaintiffs made inquiries about Premiere's agreement with DigiTEC. Next, Plaintiffs contend that Premiere "disguised Touch 1's bad debt through sham purchase transaction." *See id.* (citing Plaintiffs' Statement of Facts, ¶¶ 184-89). Plaintiffs' Statement of Facts, however, does not support Plaintiffs' characterization of the transaction, but rather states that Premiere entered into a "Strategic Alliance Agreement" with Touch 1 whereby Premiere purchased Touch 1's calling card customer list and granted Touch 1 certain management rights. Plaintiffs do not explain how this transaction is a "sham" or assert that this agreement, signed in the fall of 1997 would not have been available to them had they inquired during the due diligence process.

[8] Although Plaintiffs contend that a due diligence defense to the element of justifiable reliance is a question for the jury, numerous courts applying New York law have granted defendants' motions for summary judgment in negligent misrepresentation claims based on a determination that the plaintiff could not have reasonably relied on the defendants' statements. *See, e.g., Lazard Freres & Co. v. Protective Life Insurance,* 108 F.3d 1531 (2d Cir. 1997); *Grumman Allied Industries, Inc. v. Rohr Industries, Inc.,* 748 F.2d 729, 740 (2d Cir. 1984); *Consolidated Edison Inc. v. Northeast Utilities,* 249 F. Supp. 2d 387, 408-09

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B. Standing under the 1933 Securities Act

Section 11 of the Securities Act provides a cause of action against the signers of a registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k. Section 12(a)(2) provides a cause of action against any person who "offers or sells a security" by means of a prospectus or oral communication "which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading." 15 U.S.C. § 77l(a)(2). Sections 11 and 12(a)(2) apply only to public offerings. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 578 (1995).[9] Defendants contend that it is clear Plaintiffs did not acquire their stock through a public offering, and thus, do not have standing under Sections 11 or 12, because (1) Plaintiffs signed separate Stockholder Agreements and Affiliate Letters which governed their receipt of shares in the Premiere/Xpedite merger and restricted the sale of their shares; (2) Plaintiffs had due diligence rights and gained inside, confidential information as a result of those rights; (3) Plaintiffs received other benefits from the sale

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(S.D.N.Y. 2003); *Wells Fargo Bank v. Taca International Airlines, S.A.*, 247 F. Supp. 2d 352, 369 (S.D.N.Y. 2002).

[9] Although some courts have held that aftermarket purchasers. cannot bring a claim under section 11, that issue is not relevant to the instant suit. *See generally DeMaria v. Anderson*, 318 F.3d 170 (2d Cir. 2003).

of certain European subsidiaries; and (4) Plaintiffs had unique positions as early investors in Xpedite.[10]

The court is faced with the unique situation where an offering was made pursuant to a Registration Statement and a Prospectus, but Defendants contend now that the offering to these Plaintiffs was not a public offering.[11] The parties have not pointed the court to any directly applicable case

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[10] In its prior order, the court noted that Defendants had argued that Plaintiffs had not acquired their stock in a public offering because they were given non-public information relating to Premiere's valuation, the Voice-Tel and VoiceCom acquisitions, as well as other information. Because Plaintiffs had not alleged in their complaint that the information they received about these transactions was non-public, the court declined to address Defendants' argument at the motion to dismiss stage. *See* Order, at 18 n.4. Defendants have renewed this argument after discovery.

[11] In its previous order on Defendants' motion to dismiss, the court rejected Defendants' argument that because Plaintiffs had signed the Stockholder Agreements prior to the issuance of the Registration Statement and Prospectus, they were already "committed" to vote for the merger, and the Registration Statement and Prospectus could not have influenced their decisions. The court found that the Merger Agreement here "provided that the obligations of each party to effect the merger were subject to the prior satisfaction of certain conditions" and "could be terminated at any time prior to the effective date 'notwithstanding approval thereof by the stockholders of the Company or the stockholders of Parent,' if there was a material breach of any representation, warranty, covenant, or agreement by either party." Order, at 17. Thus, the court found that Plaintiffs had not irrevocably committed themselves to the acquisition of Premiere stock by executing the Stockholder Agreements.

In their motion for summary judgment, Defendants ask the court to reconsider its ruling with respect to the "commitment theory," however, the court finds that no new information has arisen in the course of discovery that would warrant such a reconsideration. Thus, as the court stated in its February 28, 2000 order, the date of the sale was the effective date of the merger, which occurred after the issuance of the Registration Statement and Prospectus and Plaintiffs acquired their stock pursuant to a Registration Statement.

law and the court has found none. However, in *Flake v. Hoskins,* 55 F. Supp. 2d 1196 (D. Kan. 1999), the court noted in passing that the mere fact that the defendants had filed a registration statement did not establish that registration was required, and thus, that the offering was a public offering. *Id.* at 1229 n.21. *But cf. Gustafson,* 513 U.S. at 569 ("By and large, only public offerings by an issuer of a security, or by controlling shareholders of an issuer, require the preparation and filing of registration statements"). Assuming, then, that the filing of a registration statement is not dispositive on whether the issuance of securities was in the course of a public offering, the court finds that the factors set forth in *S.E.C. v. Ralston Purina Co.,* 346 U.S. 119 (1953), for determining whether an offering is an exempt private offering under Section 4(2) of the Securities Act, codified at 15 U.S.C. § 77d(2), to be instructive.

The central question in determining whether an offering should be registered is "the need of the offerees for the protections afforded by registration." *Ralston Purina Co.,* 346 U.S. at 127. Factors useful in determining whether an offering is exempt from the Securities Act's registration requirement include: (1) the number of offerees and their relationship to the issuer; (2) the number of units offered; (3) the size of the offering; and (4) the manner of the offering. The burden of proving that the offering did not need to be registered falls on the issuer. *Id.* at 126.

In *Doran v. Petroleum Management Corp.,* 545 F.2d 893 (5th Cir. 1977), the court set forth these factors and instructed that:

> [c]onsideration of these factors need not exhaust the inquiry, nor is one factor's weighing heavily in favor of the private status of the offering sufficient to ensure the availability of the exemption. Rather, these factors serve as guideposts to the court in attempting to determine whether subjecting the offering to registration requirements would further the purposes of the 1933 Act.

Id. at 900. The purpose of the 1933 Act is "to protect investors by promoting full disclosure of information thought necessary to informed investment decisions." *Id.* The "exemption question turns on the knowledge of the offerees." *Id.*

Plaintiffs, here, are four large pension investment funds and two professional individuals, one of whom sat on the Board of Directors of Xpedite. The APA Funds "were generally limited partnerships, sophisticated large institutional investors. . . . " Chefitz Depo., at 24. The investors in APA Excelsior III, L.P. "were large pension funds who had alternative/private equity classes that participated in venture funds." *Id.* at 65. Some of the investors were the AT&T pension fund managed by J.P. Morgan, the State of New York, and Nynex's pension fund. *Id.* The minimum investment amount was $5 million. *Id.* APA Excelsior III Offshore L.P. was comprised of "sophisticated corporate pension funds . . . from foreign companies." *Id.* at 70. APA/Fostin Pennsylvania Venture Capital Fund had Pennsylvania's "two largest state pension funds, . . . the state employees' pension fund and the state teachers' fund." *Id.* at 71. David Epstein is in the real estate business developing shopping malls. Stuart Epstein is an attorney. Furthermore, as described above, Plaintiffs had the guidance of Merrill Lynch, Paul Hastings, and Ernst &

Young during the due diligence process. Merrill Lynch, itself, was represented by Simpson, Thatcher & Bartlett.

The manner of the offering to these Plaintiffs took place through the signing of a Stockholder Agreement, an Affiliate Letter, and a due diligence period, all which occurred two months before the Registration Statement was issued. The negotiations between Premiere and certain officers of Xpedite which led to the Stockholder Agreement and Affiliate Letter were available to a very small number of people. Only eight of Xpedite's shareholders signed the Affiliate Letter, including Robert Chefitz for APA Excelsior III, L.P., APA/Fostin Pennsylvania Venture Capital Fund, L.P., APA Excelsior III/Offshore, L.P., and CIN Venture Nominees, Ltd.; Robert Chefitz individually; Philip A. Campbell, Roy B. Andersen, Vincent DeVita, and Max A. Slifer, officers with Xpedite; John C. Baker, a senior vice president and partner in APA; and David Epstein. As described above, Plaintiffs agree that during the due diligence process, Premiere gave public and confidential financial information to Xpedite's due diligence investigators, including historical and forecasted financial information, such as the latest available aging of accounts receivable, containing collections since aging date, and aging of accounts payable. Thus, in addition to being sophisticated investors, Plaintiffs had access to relevant information. *See Doran*, 545 F.2d at 902. Significantly, other Xpedite shareholders did not acquire their Premiere securities with the benefits of the Stockholder Agreement, Affiliate Letter, and the due diligence process. As such, the court finds that Plaintiffs had a unique relationship with Premiere as a result of their status within the Xpedite organization and acquired their securities in a manner different from all other Xpedite shareholders.

Furthermore, by signing the Affiliate Letter, Plaintiffs expressly acknowledged that they were aware that Premiere had no obligation to file a Registration Statement for the offering to them. *See* Affiliate Letter, Defs.' Mot. S.J., Exh. B, § 3(b) (the "undersigned understands that, except as provided in the Agreement, Parent is under no obligation to file a registration statement with the SEC covering the disposition of the undersigned's shares of Parent Common Stock or to take any other action necessary to make compliance with an exemption from such registration available"). By signing the Affiliate Letter, Plaintiffs also recognized that their Premiere stock was subject to restrictions on resale within thirty days after the merger was finalized. *See id.*, § 4.

Here, the court concludes that it would not serve the purposes of the 1933 Act to allow sophisticated investors who had access to significant confidential and inside information through the exercise of due diligence rights to convert their acquisition of securities into a public offering by mere fact that Defendants provided a Registration Statement. In *Doran,* the court described the purpose of the 1933 Act as promoting full disclosure of information necessary for informed investment decisions. 545 F.2d at 900. Plaintiffs, here, had knowledge of certain risks and full access to information. Thus, Plaintiffs are not of the type of investor requiring the protections of the Securities Act when receiving securities in a manner different than other investors. *See also Maldonado v. Dominguez,* 137 F.3d 1, 8 (1st Cir. 1998) (a "placement of stock is private if it is offered only to a few sophisticated purchasers who each have a relationship with the issuer, enabling them to command access to information that would otherwise be contained in a registration statement"). Unlike the investors

who did not negotiate a Stockholder Agreement, Affiliate Letter, or conduct due diligence, these Plaintiffs had available to them confidential, inside information from Premiere. Said another way they did not obtain their stock pursuant to the registration statement. Accordingly, the court GRANTS Defendants' motion for summary judgment on Plaintiff's securities claims.[12]

III. Conclusion

The court GRANTS Defendants' motion for summary judgment [150-1]. The court DENIES AS MOOT Defendants' motion in limine [149-1]. The Clerk of the Court is DIRECTED to DISMISS WITH PREJUDICE Plaintiffs' complaint.

IT IS SO ORDERED this 26th day of September 2003.

/s/ J. Owen Frrester
J. OWEN FORRESTER
UNITED STATES DISTRICT JUDGE

[12] Because the court grants Defendants' motion for summary judgment, the court DENIES AS MOOT Defendants' motion in limine to exclude the testimony of Plaintiffs' expert Scott Hakala.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

APA EXCELSIOR III L.P., *et al.* Plaintiffs, vs. PREMIERE TECHNOLOGIES, INC., *et al.*, Defendants.	CIVIL ACTION FILE NO. 1:99-cv-1377-JOF

JUDGMENT

This action having come before the court, Honorable J. Owen Forrester, United States District Judge, for consideration of defendants' Motion for Summary Judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiffs take nothing; that the defendants recover their costs of this action, and the action be, and the same hereby, is **dismissed**.

Dated at Atlanta, Georgia, this 26th day of September, 2003.

LUTHER D. THOMAS
CLERK OF COURT

By: /s/ Andrea Gee
Andrea Gee, Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
September 30, 2003
Luther D. Thomas
Clerk of Court

By: /s/ Andrea Gee
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15552-HH

APA EXCELSIOR III L.P.,
APA EXCELSIOR III OFFSHORE L.P.,
APA/FOSTIN PENNSYLVANIA VENTURE CAPITAL FUND,
CIN VENTURES NOMINEES LIMITED,
STUART A. EPSTEIN,
DAVID EPSTEIN,

Plaintiffs-Appellants

versus

PREMIERE TECHNOLOGIES, INC.,
BOLAND T. JONES,
PATRICK G. JONES,
GEORGE W. BAKER, SR.,
RAYMOND H. PIRTLE, JR.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Nov. 22, 2004)

Before: BLACK. and KRAVITCH, Circuit Judges, and STROM*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

* Honorable Lyle E. Strom, United States District Judge for the District of Nebraska, sitting by designation.

SECTION 11 OF THE SECURITIES ACT OF 1933

15 U.S.C. § 77k

(a) Persons possessing cause of action; persons liable

In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue –

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation,

which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without proof of the reading of the registration statement by such person.

(b) Persons exempt from liability upon proof of issues

Notwithstanding the provisions of subsection (a) of this section no person, other than the issuer, shall be liable as provided therein who shall sustain the burden of proof –

(1) that before the effective date of the part of the registration statement with respect to which his liability is asserted

(A) he had resigned from or had taken such steps as are permitted by law to resign from, or ceased or refused to act in, every office, capacity, or relationship in which he was described in the registration statement as acting or agreeing to act, and

(B) he had advised the Commission and the issuer in writing that he had taken such action and that he would not be

responsible for such part of the registration statement; or

(2) that if such part of the registration statement became effective without his knowledge, upon becoming aware of such fact he forthwith acted and advised the Commission, in accordance with paragraph (1) of this subsection, and, in addition, gave reasonable public notice that such part of the registration statement had become effective without his knowledge; or

(3) that

(A) as regards any part of the registration statement not purporting to be made on the authority of an expert, and not purporting to be a copy of or extract from a report or valuation of an expert, and not purporting to be made on the authority of a public official document or statement, he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading; and

(B) as regards any part of the registration statement purporting to be made upon his authority as an expert or purporting to be a copy of or extract from a report or valuation of himself as an expert,

(i) he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or

(ii) such part of the registration statement did not fairly represent his statement as an expert or was not a fair copy of or extract from his report or valuation as an expert; and

(C) as regards any part of the registration statement purporting to be made on the authority of an expert (other than himself) or purporting to be a copy of or extract from a report or valuation of an expert (other than himself), he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert; and

(D) as regards any part of the registration statement purporting to be a statement made by an official person or purporting to be a copy of or extract from a public official document, he had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue, or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement made by the official person or was not a fair copy of or extract from the public official document.

(c) Standard of reasonableness

In determining, for the purpose of paragraph (3) of subsection (b) of this section, what constitutes reasonable investigation and reasonable ground for belief, the standard of reasonableness shall be that required of a prudent man in the management of his own property.

(d) Effective date of registration statement with regard to underwriters

If any person becomes an underwriter with respect to the security after the part of the registration statement with respect to which his liability is asserted has become effective, then for the purposes of paragraph (3) of subsection (b) of this section such part of the registration statement shall be considered as having become effective with respect to such person as of the time when he became an underwriter.

(e) Measure of damages; undertaking for payment of costs

The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and

(1) the value thereof as of the time such suit was brought, or

(2) the price at which such security shall have been disposed of in the market before suit, or

(3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. In no event shall any underwriter (unless such underwriter shall have knowingly received from the issuer for acting as an underwriter some benefit, directly or indirectly, in which all other underwriters

similarly situated did not share in proportion to their respective interests in the underwriting) be liable in any suit or as a consequence of suits authorized under subsection (a) of this section for damages in excess of the total price at which the securities underwritten by him and distributed to the public were offered to the public. In any suit under this or any other section of this subchapter the court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees, and if judgment shall be rendered against a party litigant, upon the motion of the other party litigant, such costs may be assessed in favor of such party litigant (whether or not such undertaking has been required) if the court believes the suit or the defense to have been without merit, in an amount sufficient to reimburse him for the reasonable expenses incurred by him, in connection with such suit, such costs to be taxed in the manner usually provided for taxing of costs in the court in which the suit was heard.

(f) Joint and several liability; liability of outside director

(1) Except as provided in paragraph (2), all or any one or more of the persons specified in subsection (a) of this section shall be jointly and severally liable, and every person who becomes liable to make any payment under this section may recover contribution as in cases of contract from any person who, if sued separately, would have been liable to make the same payment, unless the person

who has become liable was, and the other was not, guilty of fraudulent misrepresentation.

(2)

(A) The liability of an outside director under subsection (e) of this section shall be determined in accordance with section 78u–4 (f) of this title.

(B) For purposes of this paragraph, the term "outside director" shall have the meaning given such term by rule or regulation of the Commission.

(g) Offering price to public as maximum amount recoverable

In no case shall the amount recoverable under this section exceed the price at which the security was offered to the public.

["CONFIDENTIAL PURSUANT TO 10/17/00 STIPULATED ORDER REGARDING CONFIDENTIAL INFORMATION."]

STOCKHOLDER AGREEMENT

STOCKHOLDER AGREEMENT dated as of November 13, 1997, among the person whose name appears on Schedule 1 (the "STOCKHOLDER"), Xpedite Systems, Inc., a Delaware corporation (the "COMPANY"), and Premiere Technologies, Inc., a Georgia corporation ("PARENT").

WHEREAS, Parent proposes to enter into a Merger Agreement dated as of the date hereof (as amended from time to time, the "MERGER AGREEMENT"; capitalized terms used but not defined herein shall have the meanings set forth in the Merger Agreement, whether or not such Merger Agreement shall be in effect from time to time) with the Company which provides, among other things, that Nets Acquisition Corp., a Delaware corporation and a wholly owned subsidiary of Parent, will merge with and into the Company pursuant to the merger contemplated by the Merger Agreement (the "MERGER");

WHEREAS, as of the date hereof, the Stockholder beneficially owns the number of shares of common stock, par value $.01 per share, of the Company ("COMPANY COMMON STOCK") set forth on Schedule 1; and

WHEREAS, as a condition to the willingness of Parent to enter into the Merger Agreement, Parent has requested that the Stockholder agree, and in order to induce Parent to enter into the Merger Agreement, the Stockholder has agreed, to enter into this Agreement with respect to all the shares of Company Common Stock now beneficially owned and of which the Stockholder may hereafter acquire beneficial ownership (the "SHARES")

and any other securities, if any, which the Stockholder is entitled to vote at any meeting of stockholders of the Company (the "OTHER SECURITIES").

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, and intending to be legally bound hereby, the parties hereto agree as follows:

ARTICLE I

VOTING AGREEMENT

SECTION 1.01 VOTING AGREEMENT. The Stockholder hereby agrees that, subject to Schedule 1, at any meeting of the stockholders of the Company, however called, or in connection with any written consent of the holders of shares of Company Common Stock, the Stockholder shall vote (or cause to be voted) the Shares and the Other Securities in favor of the Merger, the execution and delivery by the Company of the Merger Agreement and the approval of the terms thereof and each of the other actions contemplated by the Merger Agreement and this Agreement and any actions required in furtherance thereof and hereof. The Stockholder agrees that the Stockholder shall not enter into any agreement or understanding with any person or entity the effect of which would be to violate the provisions and agreements contained in this Section 1.01. The Stockholder acknowledges receipt and review of a copy of the Merger Agreement.

SECTION 1.02 IRREVOCABLE PROXY. The Stockholder hereby irrevocably appoints Parent and each of its officers, as the Stockholder's attorney and proxy pursuant to the provisions of Section 212(c) of the General Corporation

Law of the State of Delaware, with full power of substitution, to vote and otherwise act (by written consent or otherwise) with respect to the Shares and the Other Securities, which the Stockholder is entitled to vote at any meeting of stockholders of the Company (whether annual or special and whether or not an adjourned or postponed meeting) or consent in lieu of any such meeting or otherwise, on the matters and in the manner specified in Section 1.01. THIS PROXY AND POWER OF ATTORNEY IS IRREVOCABLE AND COUPLED WITH AN INTEREST. The Stockholder hereby revokes all other proxies and powers of attorney with respect to the Shares and the Other Securities that the Stockholder may have heretofore appointed or granted, and no subsequent proxy or power of attorney shall be given or written consent executed (and if given or executed, shall not be effective) by the Stockholder with respect thereto. All authority herein conferred or agreed to be conferred shall survive the death or incapacity of the Stockholder and any obligation of the Stockholder under this Agreement shall be binding upon the heirs, personal representatives, successors and assigns of the Stockholder. The Shareholder hereby affirms that the irrevocable proxy set forth in this SECTION 1.02 is given in connection with the execution of the Merger Agreement, and that such irrevocable proxy is given to secure the performance of the duties of the Shareholder under this Agreement. The Shareholder hereby ratifies and confirms all that such irrevocable proxy may lawfully do or cause to be done by virtue hereof.

ARTICLE II

REPRESENTATIONS AND WARRANTIES

SECTION 2.01 REPRESENTATIONS AND WARRANTIES OF THE STOCKHOLDER. The Stockholder represents and warrants to Parent as follows:

(a) This Agreement has been duly executed and delivered by the Stockholder and is a legal, valid and binding obligation of the Stockholder, enforceable against the Stockholder in accordance with its terms. There is no beneficiary or holder of a voting trust certificate or other interest of any trust of which Stockholder is trustee whose consent is required for the execution and delivery of this Agreement or the consummation by the Stockholder of the transactions contemplated hereby.

(b) The execution and delivery of this Agreement by the Stockholder do not, and the performance of this Agreement by the Stockholder will not, (i) conflict with or violate any federal, state, local or foreign law, statute, ordinance, rule, regulation, permit, injunction, writ, judgment, decree or order (collectively, "LAWS") of any domestic or foreign administrative, governmental or regulatory agency or other governing body (each, a "GOVERNMENTAL ENTITY") applicable to the Stockholder or by which any of the Stockholder's assets are bound, or (ii) conflict with, result in any breach of or constitute a default (or an event that with notice or lapse of time or both would become a default) under, or give to others any rights of termination, amendment, acceleration or cancellation of, or require payment under, or result in the creation of any Encumbrance (as hereinafter defined) on any of the assets of the Stockholder pursuant to, any contract or other instrument to which the Stockholder is a party or by which the Stockholder

or any of the Stockholder's assets are bound, except for any thereof that could not reasonably be expected to materially impair the ability of the Stockholder to perform the Stockholder's obligations hereunder or to consummate the transactions contemplated hereby and except for any Encumbrances created hereby.

(c) The execution and delivery of this Agreement by the Stockholder do not, and the performance of this Agreement by the Stockholder will not, require the Stockholder to obtain any consent, approval, authorization or permit of, or to make any filing with or notification to, any Governmental Entity based on any Laws of any Governmental Entity, except (i) the Securities Exchange Act of 1934, as amended, and the rules and regulations of the Securities and Exchange Commission (the "COMMISSION") thereunder (the "EXCHANGE ACT"), and the Securities Act of 1933, as amended, and the rules and regulations of the Commission thereunder (the "SECURITIES ACT"); and (ii) where the failure to obtain such consents, approvals, authorizations or permits, or to make such filings or notifications, could not reasonably be expected to materially impair the ability of the Stockholder to perform its obligations hereunder or to consummate the transactions contemplated hereby.

(d) There is no suit, action, investigation or proceeding pending or, to the knowledge of the Stockholder, threatened against the Stockholder at law or in equity before or by any Governmental Entity that could reasonably be expected to materially impair the ability of the Stockholder to perform the Stockholder's obligations hereunder or to consummate the transactions contemplated hereby, and there is no judgment, decree, injunction, rule, order or writ of any Governmental Entity to

which the Stockholder or the Stockholder's assets are subject that could reasonably be expected to materially impair the ability of the Stockholder to perform the Stockholder's obligations hereunder or to consummate the transactions contemplated hereby.

(e) The Stockholder owns beneficially and of record the number of shares of Company Common Stock (the "EXISTING SHARES") set forth on Schedule 1. The Existing Shares constitute all the shares of Company Common Stock owned of record or beneficially by the Stockholder. The Stockholder has sole voting power, sole power of disposition and all other stockholder rights with respect to all the Existing Shares, with no restrictions, other than pursuant to applicable securities laws, on the Stockholder's rights of disposition pertaining thereto. The Stockholder has good and valid title to all the Existing Shares, free and clear of all Encumbrances (other than any Encumbrance created by this Agreement).

(f) The Stockholder understands and acknowledges that Parent is entering into, and causing Acquisition Sub to enter into, the Merger Agreement in reliance upon the Stockholder's execution and delivery of this Agreement. The Stockholder acknowledges that the irrevocable proxy set forth in SECTION 1.02 is granted in consideration for the execution and delivery of the Merger Agreement by Parent and Acquisition Sub.

SECTION 2.02 REPRESENTATIONS AND WARRANTIES OF PARENT. Parent represents and warrants to the Stockholder that Parent is a corporation duly organized, validly existing and in good standing under the laws of the State of Georgia. Parent has the requisite corporate power and authority to enter into this Agreement and to carry out

its obligations hereunder. The execution and delivery of this Agreement and the consummation of the transactions contemplated hereby have been duly authorized by Parent's Board of Directors and (except as otherwise set forth in the Merger Agreement) no other corporate proceedings on the part of Parent are necessary to authorize this Agreement and the consummation of the transactions contemplated hereby. This Agreement has been duly executed and delivered by Parent and is a legal, valid and binding obligation of Parent, enforceable against Parent in accordance with its terms.

ARTICLE III

COVENANTS OF THE STOCKHOLDER

SECTION 3.01 CONFIDENTIALITY OF AGREEMENT. Each party hereto agrees that, without the prior written consent of the other party, it will not disclose this Agreement, or the contents hereof, to any person or entity, except (a) such party's directors, employees, agents, advisors and affiliates, in each case on a confidential and need-to-know basis, (b) filings of, or filings of amendment(s) to, Schedule 13D, or (c) as is required, in the opinion of its counsel, by applicable law or pursuant to applicable requirements of any listing agreement with or the rules of any securities exchange or the NASDAQ National Market, provided that if any party hereto proposes to make any disclosure based upon the opinion of its counsel such party will, if practicable, advise and consult with the other party at least one business day prior to such disclosure concerning the information such party proposes to disclose.

SECTION 3.02 FURTHER ASSURANCES. The Stockholder agrees to use the Stockholder's reasonable best efforts to take, or cause to be taken, all appropriate action, and to do, or cause to be done, all things necessary, proper or advisable under applicable laws and regulations to consummate and make effective the transactions contemplated by this Agreement. If any further action is necessary or desirable to carry out the purposes of this Agreement, the Stockholder shall use the Stockholder's reasonable best efforts to take all such action as promptly as practicable.

ARTICLE IV

TERMINATION

SECTION 4.01 TERMINATION. This Agreement shall terminate upon the earlier of (a) the termination of the Merger Agreement for any reason whatsoever and (b) the Effective Time of the Merger and, except as set forth below, the parties hereto shall have no further rights or obligations with respect thereto, except as a result of any prior breach thereof.

ARTICLE V

DEFINITIONS

SECTION 5.01 DEFINITIONS. For purposes of this Agreement:

(a) "BENEFICIALLY OWN" or "BENEFICIAL OWNERSHIP" with respect to any securities shall mean having "beneficial ownership" of such securities (as determined pursuant to Rule 13d-3 under the Exchange Act),

including pursuant to any agreement, arrangement or understanding, whether or not in writing;

(b) "PERSON" shall mean an individual, corporation, partnership, joint venture, association, trust, unincorporated organization or other entity.

(c) "ENCUMBRANCE" means any pledge, security interest, lien, claim, encumbrance, mortgage, charge, hypothecation, option, right of first refusal or offer, community property right, other marital right, preemptive right, voting agreement, voting trust, proxy, power of attorney, escrow, option, forfeiture, penalty, action at law or in equity, security agreement, stockholder agreement or other agreement, arrangement, contract, commitment, understanding or obligation, or any other restriction, qualification or limitation on the use, transfer, right to vote, right to dissent and seek appraisal, receipt of income or other exercise of any attribute of ownership.

ARTICLE VI

MISCELLANEOUS

SECTION 6.01 SEVERABILITY. If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule of law, or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of this Agreement is not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties

as closely as possible in a mutually acceptable manner in order that the terms of this Agreement remain as originally contemplated to the fullest extent possible.

SECTION 6.02 ENTIRE AGREEMENT. This Agreement constitutes the entire agreement among the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, both written and oral, among the parties with respect to the subject matter hereof.

SECTION 6.03 COUNTERPARTS. This Agreement may be executed and delivered (including by facsimile transmission) in one or more counterparts, and by the different parties hereto in separate counterparts, each of which when executed and delivered shall be deemed to be an original but all of which taken together shall constitute one and the same instrument.

SECTION 6.04 ASSIGNMENT. This Agreement shall not be assigned by operation of law or otherwise without the prior written consent of the other parties, provided that Parent may assign its rights hereunder to any of its affiliates, but no such assignment shall relieve Parent of its obligations hereunder.

SECTION 6.05 AMENDMENTS. This Agreement may not be amended, supplemented, waived or otherwise modified or terminated, except upon the execution and delivery of a written agreement executed by the parties hereto.

SECTION 6.06 NOTICES. All notices, requests, claims, demands and other communications hereunder shall be in writing and shall be given (and shall be deemed to have been duly received if so given) by hand delivery,

facsimile transmission, mail (registered or certified mail, postage prepaid, return receipt requested), or courier service providing proof of delivery. All communications hereunder shall be delivered to the respective parties at the following addresses:

> If to Stockholder, to the address set forth on Schedule 1
>
> If to the Company or Parent, to their respective addresses set forth in the Merger Agreement, with copies delivered as provided therein

or to such other address as the person to whom notice is given may have previously furnished to the others in writing in the manner set forth above.

SECTION 6.07 NO THIRD PARTY BENEFICIARIES. This Agreement is not intended to be for the benefit of, and shall not be enforceable by, any person or entity not a party hereto.

SECTION 6.08 SPECIFIC PERFORMANCE. Each of the parties hereto acknowledges that a breach by it of any agreement contained in this Agreement will cause the other parties to sustain damage for which they would not have an adequate remedy at law for money damages, and therefore each of the parties hereto agrees that in the event of any such breach the aggrieved parties shall be entitled to the remedy of specific performance of such agreement and injunctive and other equitable relief in addition to any other remedy to which they may be entitled, at law or in equity.

SECTION 6.09 REMEDIES CUMULATIVE. All rights, powers and remedies provided under this Agreement or otherwise available in respect hereof at law or in

equity shall be cumulative and not alternative, and the exercise of any thereof by any party shall not preclude the simultaneous or later exercise of any other such right, power or remedy by such party.

SECTION 6.10 NO WAIVER. The failure of any party hereto to exercise any right, power or remedy provided under this Agreement or otherwise available in respect hereof at law or in equity, or to insist upon strict compliance by any other party hereto with its obligations hereunder, and any custom or practice of the parties at variance with the terms hereof, shall not constitute a waiver by such party of its right to exercise any such or other right, power or remedy or to demand such compliance.

SECTION 6.11 GOVERNING LAW.

(a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of Delaware, without giving effect to the principles of conflicts of law thereof.

(b) Each party hereby irrevocably submits to the exclusive jurisdiction of the Court of Chancery in the State of Delaware in any action, suit or proceeding arising in connection with this Agreement, and agrees that any such action, suit or proceeding shall be brought only in such court (and waives any objection based on FORUM NON CONVENIENS or any other objection to venue therein); PROVIDED, HOWEVER, that such consent to jurisdiction is solely for the purpose referred to in this subsection (b) and shall not be deemed to be a general submission to the jurisdiction of such court or in the State of Delaware other than for such purposes.

SECTION 6.12 WAIVER OF JURY TRIAL. EACH OF PARENT, THE COMPANY AND THE STOCKHOLDER HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE ACTIONS OF PARENT, THE COMPANY OR THE STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

SECTION 6.13 DESCRIPTIVE HEADINGS. The descriptive headings used herein are inserted for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

_____
Name:

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: /s/ [Illegible]
Name:
Title:

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

SECTION 6.13 DESCRIPTIVE HEADINGS. The descriptive headings used herein are inserted for convenience of reference only and are not intended to be part of or to affect the meaning or interpretation of this Agreement.

SECTION 6.14 RESTRICTIVE LEGEND. The Stockholder and the Company hereby agree that the Stockholder's Shares and Options, whether now owned or hereafter acquired, shall be certificated by the Company, and that the Company shall place the following legend on any new or existing certificate representing the Stockholder's Shares or Options:

> "Transfer and voting of the securities represented by this certificate are subject to restrictions set forth in a Stockholder Agreement dated November 13, 1997, a copy of which may be obtained from the Company at its principal executive offices."

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

_____
Name:

XPEDITE SYSTEMS, INC.

By: /s/ Robert Chefitz
Name: Robert Chefitz
Title: Director

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

_____
Name:

XPEDITE SYSTEMS, INC.

By: /s/ Robert Chefitz
Name: Robert Chefitz
Title: Director

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

_____
Name:

XPEDITE SYSTEMS, INC.

By: /s/ Robert Chefitz
Name: Robert Chefitz
Title: Director

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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_____
Name:

XPEDITE SYSTEMS, INC.

By: /s/ Robert Chefitz
Name: Robert Chefitz
Title: Director

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

_____
Name:

XPEDITE SYSTEMS, INC.

By: /s/ Robert Chefitz
Name: Robert Chefitz
Title: Director

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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[Stock Agr]

SECTION 6.14 RESTRICTIVE LEGEND. The Stockholder and the Company hereby agree that the Stockholder's Shares and Options, whether now owned or hereafter acquired, shall be certificated by the Company, and that the Company shall place the following legend on any new or existing certificate representing the Stockholder's Shares or Options:

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

_____

Name:

XPEDITE SYSTEMS, INC.

By: /s/ Robert Chefitz

Name:

Title:

PREMIERE TECHNOLOGIES, INC.

By: _____

Name:

Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ David Epstein
Name: David Epstein

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Philip A. Campbell
Name: Philip A. Campbell

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ John C. Baker
Name: John C. Baker

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Robert Chefitz
Name: APA Excelsior III, L.P.
Robert Chefitz

XPEDITE SYSTEMS, INC.

By: /s/ John C. Baker
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Robert Chefitz
Name: APA Fostin Pennsylvania Venture Capital Fund, L.P.
Robert Chefitz

XPEDITE SYSTEMS, INC.
By: /s/ John C. Baker
Name:
Title:

PREMIERE TECHNOLOGIES, INC.
By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Robert Chefitz
Name: CIN Venture Nominees, Ltd.
Robert Chefitz

XPEDITE SYSTEMS, INC.

By: /s/ John C. Baker
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Robert Chefitz
Name: APA Excelsior III/
Offshore, L.P.
Robert Chefitz

XPEDITE SYSTEMS, INC.
By: /s/ John C. Baker
Name: John C. Baker
Title: Director

PREMIERE TECHNOLOGIES, INC.
By: _____
Name:
Title:

[By Fax]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Vincent Devita
Name: Vincent Devita

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Max A. Slifer
Name: Max A. Slifer

XPEDITE SYSTEMS, INC.

By: /s/ ~~Max A. Slifer~~
Name: ~~Max A. Slifer~~
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Robert Vateis
Name: Robert Vateis

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Dennis [Illegible]
Name: Dennis [Illegible]

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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/s/ Robert Chefitz
Name: Robert Chefitz

XPEDITE SYSTEMS, INC.

By: /s/ John C. Baker
Name: John C. Baker
Title: Director

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

[By Fax]

STOCKHOLDER IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT THEREOF.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed as of the date first above written.

/s/ Stuart Epstein
Name: Stuart Epstein

XPEDITE SYSTEMS, INC.

By: _____
Name:
Title:

PREMIERE TECHNOLOGIES, INC.

By: _____
Name:
Title:

["CONFIDENTIAL PURSUANT TO 10/17/00 STIPULATED ORDER REGARDING CONFIDENTIAL INFORMATION."]

AFFILIATE LETTER

Premiere Technologies, Inc.
3399 Peachtree Road NE
Lenox Building, Suite 400
Atlanta, Georgia 30326

Attention: Patrick G. Jones
Executive Vice President Finance and Legal

Gentlemen:

The undersigned is a stockholder of Xpedite Systems, Inc. (the "COMPANY"), a Delaware corporation, and will become a stockholder of Premiere Technologies, Inc. ("PARENT"), a Georgia corporation, pursuant to the transactions described in the Agreement and Plan of Merger, dated as of November 13, 1997 (the "AGREEMENT"), by and among Parent, Nets Acquisition Corp. ("ACQUISITION SUB") and the Company. Under the terms of the Agreement, Acquisition Sub will be merged into and with the Company (the "MERGER"), and the shares of the $.01 par value common stock of the Company ("COMPANY COMMON STOCK") will be converted into and exchanged for shares of the $.01 par value common stock of Parent ("PARENT COMMON STOCK"). This Affiliate Letter represents an agreement between the undersigned and Parent regarding certain rights and obligations of the undersigned in connection with the shares of Parent to be received by the undersigned as a result of the Merger.

In consideration of the Merger and the mutual covenants contained herein, the undersigned and Parent hereby agree as follows:

1. Affiliate Status. The undersigned understands and agrees that as to the Company the undersigned may be deemed to be an "affiliate" under Rule 145(c) as defined in Rule 405 of the Rules and Regulations of the Securities and Exchange Commission ("SEC") under the Securities Act of 1933, as amended ("SECURITIES ACT"), and the undersigned anticipates that the undersigned may be deemed to be such an "affiliate" both at the time of the Agreement is submitted to the stockholders of the Company for their consideration and adoption and at the effective time of the Merger.

2. Initial Restrictions on Dispositions. During the 30 days immediately preceding the Effective Time of the Merger, the undersigned agrees that the undersigned will not sell, transfer, or otherwise dispose of the undersigned's interests in, or reduce the undersigned's risk relative to, any of the shares of the Company Common Stock beneficially owned by the undersigned. The undersigned agrees that the undersigned will not sell, transfer, or otherwise dispose of the undersigned's interests in, or reduce the undersigned's risk relative to, any of the shares of Parent Common Stock into which the undersigned's shares of the Company Common Stock are converted upon consummation of the Merger until such time as Parent notifies the undersigned that the requirements of SEC Accounting Series Release Nos. 130 and 135 ("ASR 130 AND 135") have been met. The undersigned understands that ASR 130 and 135 relate to publication of financial results of post-Merger combined operations of Parent and the Company. Parent agrees that it will publish such results as soon as practicable after completion of the first full calendar month after consummation of the Merger containing the required period of post-Merger combined

operations and that it will notify the undersigned promptly following such publication. Notwithstanding anything in this Agreement to the contrary, the undersigned shall be permitted to transfer the shares of Company Common Stock owned by it in connection with distributions of securities by the undersigned to its equity holders on a pro rata basis in accordance with the respective interests of such equity holders in the undersigned; provided such transfer does not adversely affect the ability of Parent to treat the Merger as a pooling of interests for accounting purposes or for the Merger to qualify as a tax-free reorganization; and provided further that the undersigned shall have given Parent prior written notice of such proposed transfer and shall have supplied to Parent and its representatives such information regarding the proposed transfer as Parent or such representatives shall request to permit Parent and such representatives to confirm that such transfer will not adversely affect the ability of Parent to treat the Merger as a pooling of interests for accounting purposes or for the Merger to qualify as a tax-free reorganization.

Covenants and Warranties of Undersigned. The undersigned represents, warrants and agrees that:

(a) The Parent Common Stock received by the undersigned as a result of the Merger will be taken for the undersigned's own account and not for others, directly or indirectly, in whole or in part.

(b) The undersigned agrees not to make any sale, transfer of other disposition of the Parent Common Stock received by the undersigned in connection with the Merger in violation of the Securities Act or the rules and regulations promulgated

thereunder. Parent has informed the undersigned that any distribution by the undersigned of Parent Common Stock has not been registered under the Securities Act and that shares of Parent Common Stock received pursuant to the Merger can only be sold by the undersigned (1) following registration under the Securities Act, or (2) in conformity with the volume and other requirements of Rule 145(d) promulgated by the SEC as the same now exist or may hereafter be amended, or (3) in the opinion of counsel reasonably acceptable to the Company, or pursuant to a "no action" letter obtained by the undersigned from the staff of the Commission, such sale, transfer or other disposition is otherwise exempt from registration under the Securities Act. The undersigned understands that, except as provided in the Agreement, Parent is under no obligation to file a registration statement with the SEC covering the disposition of the undersigned's shares of Parent Common Stock or to take any other action necessary to make compliance with an exemption from such registration available.

(c) The undersigned is aware that Parent intends to treat the Merger as a tax-free reorganization under Section 368 of the Internal Revenue Code (the "CODE") for federal income tax purposes. The undersigned agrees to treat the transaction in the same manner as Parent for federal income tax purposes. The undersigned acknowledges that Section 1.368-1(b) of the Income Tax Regulations requires "continuity of interest" in order for the Merger to be treated as tax-free under Section 368 of the Code. This requirement is satisfied if, taking into account those Company stockholders who receive cash in exchange for their stock, who receive cash in lieu

of fractional shares, or who dissent from the Merger, there is no plan or intention on the part of the Company stockholders to sell or otherwise dispose of the Parent Common Stock to be received in the Merger that will reduce such stockholders' ownership to a number of shares having, in the aggregate, a value at the time of the merger of less than 50% of the total fair market value of the Company Common Stock outstanding immediately prior to the Merger. The undersigned has no prearrangement, plan or intention to sell or otherwise dispose of an amount of the undersigned's Parent Common Stock to be received in the Merger which would cause the foregoing requirement not to be satisfied.

4. *Restrictions on Transfer.* The undersigned understands and agrees that stop transfer instructions with respect to the shares of Parent Common Stock received by the undersigned pursuant to the Merger will be given to Parent's Transfer Agent and that there will be placed on the certificates for such shares, or shares issued in substitution thereof, a legend stating in substance:

"The shares represented by this certificate were issued pursuant to a business combination which is accounted for as a "pooling of interests" and may not be sold, nor may the owner thereof reduce the owner's risks relative thereto in any way, until such time as Premiere Technologies, Inc. ("Parent") has published the financial results covering at least 30 days of combined operations after the effective date of the merger through which the business combination was effected. In addition, the shares represented by this certificate may not be sold, transferred or otherwise disposed of except or unless (1) covered by an effective registration statement under the Securities Act of 1933,

as amended, (2) in accordance with (i) Rule 145(d) (in the case of shares issued to an individual who is not an affiliate of Parent) or (ii) Rule 144 (in the case of shares issued to an individual who is an affiliate of Parent) of the Rules and Regulations of such Act, or (3) in accordance with a legal opinion satisfactory to counsel for Parent that such sale or transfer is otherwise exempt from the registration requirements of such Act."

Such legend will also be placed on any certificate representing Parent securities issued subsequent to the original issuance of the Parent Common Stock pursuant to the Merger as a result of any transfer of such shares or any stock dividend, stock split, or other recapitalization as long as the Parent Common Stock issued to the undersigned pursuant to the Merger has not been transferred in such manner to justify the removal of the legend therefrom. Upon the request of the undersigned, Parent shall cause the certificates representing the shares of Parent Common Stock issued to the undersigned in connection with the Merger to be reissued free of any legend relating to restrictions on transfer by virtue of ASR 130 and 135 as soon as practicable after the requirements of ASR 130 and 135 have been met. In addition, if the provisions of Rules 144 and 145 are amended to eliminate restrictions applicable to the Parent Common Stock received by the undersigned pursuant to the Merger, or at the expiration of the restrictive period set forth in Rule 145(d), Parent, upon the request of the undersigned, will cause the certificates representing the shares of Parent Common Stock issued to the undersigned in connection with the Merger to be reissued free of any legend relating to the restrictions set forth in Rules 144 and 145(d) upon receipt by Parent of an

opinion of its counsel to the effect that such legend may be removed.

5. *Understanding of Restrictions on Dispositions.* The undersigned has carefully read the Agreement and this Affiliate Agreement and discussed their requirements and impact upon the undersigned's ability to sell, transfer, or otherwise dispose of the shares of Parent Common Stock received by the undersigned, to the extent the undersigned believes necessary, with the undersigned's counsel or counsel for the Company.

6. *Filing of Reports by Parent.* Parent agrees, for a period of three years after the effective date of the Merger, to file on a timely basis all reports required to be filed by it pursuant to Section 13 of the Securities Exchange Act of 1934, as amended, so that the public information provisions of Rule 145(d) promulgated by the SEC as the same are presently in effect will be available to the undersigned in the event the undersigned desires to transfer any shares of Parent Common Stock issued to the undersigned pursuant to the Merger.

7. *Transfer Under Rule 145(d).* If the undersigned desires to sell or otherwise transfer the shares of Parent Common Stock received by the undersigned in connection with the Merger at any time during the restrictive period set forth in Rule 145(d), the undersigned will provide the necessary representation letter to the transfer agent for Parent Common Stock together with such additional information as the transfer agent may reasonably request. If Parent's counsel concludes that such proposed sale or transfer complies with the requirements of Rule 145(d), Parent shall cause such counsel to promptly provide such opinions as may be necessary to Parent's Transfer Agent so that the undersigned may complete the proposed sale or transfer, and Parent shall

promptly take such other actions as may reasonably be required in order to effectuate such sale or transfer.

8. *Acknowledgments.* The undersigned recognizes and agrees that the foregoing provisions also apply to all shares of the capital stock of the Company and Parent that are deemed to be beneficially owned by the undersigned pursuant to applicable federal securities laws, which the undersigned agrees may include, without limitation, shares owned or held in the name of (i) the undersigned's spouse, (ii) any relative of the undersigned or of the undersigned's spouse who has the same home as the undersigned, (iii) any trust or estate in which the undersigned, the undersigned's spouse, and any such relative collectively own at least a 10% beneficial interest or of which any of the foregoing serves as trustee, executor, or in any similar capacity, and (iv) any corporation or other organization in which the undersigned, the undersigned's spouse and any such relative collectively own at least 10% of any class of equity securities or of the equity interest. The undersigned further recognizes that, in the event that the undersigned is a director or officer of Parent or becomes a director or officer of Parent upon consummation of the Merger, among other things, any sale of Parent Common Stock by the undersigned within a period of less than six months following the effective time of the Merger may subject the undersigned to liability pursuant to Section 16(b) of the Securities Exchange Act of 1934, as amended.

9. *Miscellaneous.* This Affiliate Agreement is the complete agreement between Parent and the undersigned concerning the subject matter hereof. Any notice required to be sent to any

party hereunder shall be sent by registered or certified mail, return receipt requested, using the addresses set forth herein or such other address as shall be furnished in writing by the parties. This Affiliate Agreement shall be governed by the laws of the State of Delaware.

This Affiliate Agreement is executed as of the day of November, 1997.

Very truly yours,

_____
Signature

_____
Print Name

_____
_____
_____
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

_____
Name:

_____
Name:

_____
Name:

AGREED TO AND ACCEPTED
as of _____, 19___

PREMIERE TECHNOLOGIES, INC.

By: _____

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Very truly yours,

/s/ Robert Chefitz
Signature

APA Excelsior III, L.P.
Print Name

_____
_____
_____
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

_____
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/s/ Robert Chefitz
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PREMIERE TECHNOLOGIES, INC.

By: /s/ [Illegible]

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Very truly yours,

/s/ Robert Chefitz
Signature

CIN Venture Nominees, Ltd.
Print Name

_____
_____
_____
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

_____
Name:

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Very truly yours,

/s/ Robert Chefitz
Signature

APA/Fostin Pennsylvania Venture Capital Fun [sic], L.P.
Print Name

Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

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Very truly yours,

/s/ Robert M. Chefitz
Signature

Robert M. Chefitz
Print Name

445 Park Avenue
NYC, NY

Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

Name:

Name:

Name:

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/s/ Robert M. Chefitz
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Robert M. Chefitz
Print Name

445 Park Avenue
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/s/ Robert M. Chefitz
Signature

Robert M. Chefitz for APA Excelsior III/Offshore, L.P.
Print Name

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Address

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This Affiliate Agreement is executed as of the 13 day of November, 1997.

Very truly yours,

/s/ Roy B. Andersen Jr.
Signature

Roy B. Andersen, Jr.
Print Name

Xpedite Systems, Inc.
Industrial Way West, Bldg. D
Eatontown, NJ 07724
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

_____
Name:

_____
Name:

_____
Name:

AGREED TO AND ACCEPTED
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Very truly yours,

/s/ Roy B. Andersen Jr.
Signature

Roy B. Andersen, Jr.
Print Name

Xpedite Systems, Inc.
Industrial Way West, Bldg. D
Eatontown, NJ 07724
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

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Very truly yours,

/s/ John C. Baker
Signature

John C. Baker
Print Name

Baker Capital Corp.
575 Madison Ave., 10th Fl.
New York, NY 10022
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

_____
Name:

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Very truly yours,

/s/ John C. Baker
Signature

John C. Baker
Print Name

Baker Capital Corp.
575 Madison Ave., 10th Fl.
New York, NY 10022
Address

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_____
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Very truly yours,

/s/ Philip A. Campbell
Signature

Philip A. Campbell
Print Name

12889 Bald Cypress Lane
Naples, FL 34119
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

Name:

Name:

Name:

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/s/ Philip A. Campbell
Signature

Philip A. Campbell
Print Name

12889 Bald Cypress Lane
Naples, FL 34119

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This Affiliate Agreement is executed as of the 13 day of November, 1997.

Very truly yours,

/s/ Vincent Devita
Signature

Vincent Devita
Print Name

1 Industrial Way West
[Illegible], NJ 07724
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

Name:

Name:

Name:

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/s/ Vincent Devita
Signature

Vincent Devita
Print Name

1 Industrial Way West
[Illegible], NJ 07724
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This Affiliate Agreement is executed as of the 13 day of November, 1997.

Very truly yours,

/s/ David Epstein
Signature

David Epstein
Print Name

Epstein Properties
830 Post Road East
Westport, CT 06880
Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

_____
Name:

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Name:

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/s/ David Epstein
Signature

David Epstein
Print Name

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830 Post Road East
Westport, CT 06880
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This Affiliate Agreement is executed as of the 13 day of November, 1997.

Very truly yours,

/s/ Max A. Slifer, Jr.
Signature

Max A. Slifer, Jr.
Print Name

2 Iroquois
Allendale, NJ 07407

Address

[add below the signatures of all registered owners of shares deemed beneficially owned by the affiliate]

Name:

Name:

Name:

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Very truly yours,

/s/ Max A. Slifer, Jr.
Signature

Max A. Slifer, Jr.
Print Name

2 Iroquois
Allendale, NJ 07407

Address

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Name:

Name:

Name:

AGREED TO AND ACCEPTED
as of _____, 19__

PREMIERE TECHNOLOGIES, INC.

By: /s/ [Illegible]

(2)

No. 04-1127

IN THE

Supreme Court of the United States

PREMIERE TECHNOLOGIES, INC., N/K/A PREMIERE GLOBAL SERVICES, INC., BOLAND T. JONES, PATRICK G. JONES, GEORGE W. BAKER, SR., and RAYMOND H. PIRTLE,

Petitioners,

v.

APA EXCELSIOR III, L.P., APA EXCELSIOR III OFFSHORE L.P., APA/FOSTIN PENNSYLVANIA VENTURE CAPITAL FUND, CIN VENTURE NOMINEES LIMITED, STUART A. EPSTEIN, and DAVID EPSTEIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

MELVYN I. WEISS
Counsel of Record
LEE A. WEISS
ANDREW WILMAR
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

Attorneys for Respondents

193813

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTER QUESTION PRESENTED

Does a plaintiff that acquires stock pursuant to a registration statement and prospectus filed with the Securities and Exchange Commission to effectuate a public offering in connection with a stock-for-stock merger have standing to pursue claims under Sections 11 and 15 of the Securities Act of 1933, when that plaintiff agreed to vote its shares in favor of the merger prior to the issuance of the registration statement and prospectus, subject to critical conditions precedent to the merger that were not met?

CORPORATE DISCLOSURE STATEMENT

None of the Respondents are held in corporate form.

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Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) 6

STATEMENT OF THE CASE

Introduction

Respondents APA Excelsior III L.P., APA Excelsior III Offshore L.P., APA/Fostin Pennsylvania Venture Capital Fund, CIN Venture Nominees Limited, Stuart A. Epstein, and David Epstein respectfully submit this brief in opposition to the petition for a writ of certiorari (the "Petition") filed by Premiere Technologies, Inc. (n/k/a/ Premiere Global Services, Inc.) ("Premiere"), Boland T. Jones, Patrick G. Jones, George W. Baker, Sr., and Raymond H. Pirtle, Jr.

The decision below involves the fact-specific question whether events that transpired during the negotiation of the subject merger have any impact on plaintiffs' standing to pursue claims under Sections 11 and 15 against defendants when plaintiffs independently acquired stock pursuant to a registration statement and prospectus filed with the Securities and Exchange Commission to effectuate a public offering. Petitioners, for obvious reasons, seek to recast the relevant dispute as one over the applicability of this Court's decision in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995) to plaintiffs' Section 11 claims. Petitioners' effort, however, is a complete red herring because plaintiffs have never disputed that *Gustafson* applies – all of the parties and the Eleventh Circuit agreed on that point.[1] Petitioners' argument, moreover, conveniently ignores that there is no split among the Courts of Appeals on the question of *Gustafson's* applicability, making certiorari inappropriate. Finally, the procedural

1. Plaintiffs' position always has been that *Gustafson* unequivocally establishes their standing in this case, because they purchased their shares in a public offering. App. at 9-12 (citations to "App. at __" refer to the Appendix to the Petition.).

posture of this case also favors denial of the Petition because further proceedings may moot the Petition, and delaying summary judgment and trial risks prejudicing plaintiffs irreparably.

Factual Background

This securities action arises out of a Registration Statement and Prospectus (collectively, the "Registration Statement") that were filed by defendants with the Securities and Exchange Commission ("SEC") on January 28, 1998, in order to consummate a stock-for-stock merger between Premiere and Xpedite Systems, Inc. (the "Merger"). Pl. 56.1, ¶ 79.[2] Discovery has demonstrated that this Registration Statement, pursuant to which plaintiffs and all other Xpedite shareholders acquired their Premiere shares, was riddled with materially false and misleading statements and omissions. *See, e.g.*, Pl. 56.1, ¶¶ 101-137, 147-175, 180-196, 198-218, 221-238.

Prior to, and as an express condition of, the execution of a definitive merger agreement (the "Merger Agreement"), Premiere required plaintiffs, among others, to execute Stockholder Agreements by which plaintiffs granted defendants a proxy to vote their shares in favor of the Merger. The Stockholder Agreements were terminable if the Merger was not consummated for any reason. Pl. 56.1, ¶¶ 47 53, 55 59.

The Merger Agreement was terminable by either party upon the occurrence of numerous conditions, including any breach of warranty or representation by Premiere. Pursuant to the Agreement, Premiere warranted and promised to file a truthful

2. Citations to Pl. 56.1 refer to Plaintiffs' Separate Statement of Material Facts Pursuant to Local Rule 56.1, filed in the District Court on December 4, 2002 [N.D. Ga. Docket No. 163].

Registration Statement with the SEC. Moreover, the Merger Agreement created an affirmative obligation that Premiere notify Xpedite of any Material Adverse Effect to its business from the Agreement's date to the effective date of the Merger. Pl. 56.1, ¶¶ 61, 71.

Many of the facts that plaintiffs allege defendants omitted from the Registration Statement became known to Premiere after the Merger Agreement and Stockholder Agreements were signed.[3] Yet, despite Premiere's express obligation to disclose this information to Xpedite, defendants utterly failed to do so. As a result, on February 27, 1998, a majority of Xpedite and Premiere shareholders, including plaintiffs, voted to approve the Merger, completely unaware of the material misstatements and omissions in the Registration Statement. Following approval, all Xpedite shareholders, including plaintiffs, received 1.165 shares of Premiere common stock in exchange for each share of their Xpedite stock, representing a purported value of $34 per Xpedite share. Pl. 56.1, ¶¶ 88-91.

On June 10, 1998, less than 4 months after Xpedite shareholders approved the Merger, Premiere issued a press release and conducted a conference call disclosing significant adverse information regarding its business. This information represented the ultimate effect of the adverse facts that existed at the time the Registration Statement was disseminated, yet were not disclosed by defendants therein. Pl. 56.1, ¶¶ 239-241, 244. In response to Premiere's June 10, 1998 announcements, Premiere's stock dropped from $14.4375 per share to $10.375 per share, a one-day decline of 28% and a decline of 69% from the $34 per Xpedite share Merger price. Pl. 56.1, ¶ 243.

3. Defendants' summary judgment motion did not pretend that there were no triable issues of fact regarding whether the Registration Statement was materially false and misleading.

In slightly over three months, the value of plaintiffs' Premiere shares declined over $56 million.

Procedural Background

In November 1998, plaintiffs filed suit against Premiere and certain of its officers and directors, alleging breach of contract, negligent misrepresentation, and violations of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933, as a result of defendants' material misstatements and omissions contained in the Registration Statement. App. 25-28. The District Court dismissed plaintiffs' breach of contract claims, and their Securities Act claims relating to some (but not all) of the alleged misrepresentations in the Registration Statement. *Id.* at 26-27. After discovery, the District Court granted summary judgment: (1) on plaintiffs' remaining Securities Act claims, holding that plaintiffs lacked standing because they did not acquire their shares pursuant to a public offering; and (2) on plaintiffs' negligent misrepresentation claims, holding that plaintiffs could not establish reasonable reliance on the misrepresentations. *Id.* at 50-51.

On appeal, the Eleventh Circuit reversed the District Court's award of summary judgment on plaintiffs' Section 11 claims, holding that plaintiffs did, in fact, have standing because they "acquire[d] their shares of Premiere pursuant to a Public Offering." *Id.* at 8 . Defendants petitioned the Eleventh Circuit for a partial rehearing, or partial rehearing *en banc*, which petitions were denied. Defendants then petitioned the Eleventh Circuit for a stay pending the filing of their certiorari petition, but were denied. Upon remand, defendants filed a renewed motion for summary judgment. Briefing of that motion is ongoing in the District Court. The Eleventh Circuit affirmed the District Court's dismissal of the negligent misrepresentation claims. *Id.* at 21.

REASONS FOR DENYING THE PETITION

This Petition rests entirely on the suspect claim that certiorari is appropriate to resolve an alleged conflict among lower courts over the applicability of the Supreme Court's decision in *Gustafson* to Section 11 claims. Petitioners' claim is flawed for at least two related reasons.

First, Petitioners' argument is disingenuous because nothing in this case turns on resolution of a non-existent conflict. Respondents' position always has been that *Gustafson* confirms their standing in this case. The Eleventh Circuit agreed, ruling that, even if *Gustafson* applied, Respondents would have standing to pursue their Section 11 claims because they purchased their shares pursuant to a single, integrated offering. App. at 7-10. Thus, even if this Court were inclined to resolve the purported split among lower courts, this case would be an inappropriate vehicle for doing so.

Second, Petitioners' argument is specious because the lower court conflict they hypothesize is not among Circuits, but between unanimous Courts of Appeal and a handful of District Courts. Again, the Eleventh Circuit assumed *Gustafson's* applicability simply for the sake of argument, without deciding the issue. Since no Court of Appeals has definitively determined whether *Gustafson* applies to claims under Section 11, there is no reason for this Court to intervene.

A. This Case Is Not a Proper Vehicle for Resolving the Question Posed by Petitioners

The Petition's principal flaw is that resolution of the question it attempts to present is irrelevant to the case at bar. *See* Robert L. Stern et al., *Supreme Court Practice* 231 (8th ed. 2002) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied"). Far from disputing Petitioners' contention that *Gustafson* applies to Section 11, Respondents' position consistently has been that *Gustafson* confirms their standing in this case because they received stock pursuant to a registration statement and prospectus filed with the SEC to effectuate a public offering. Moreover, the Eleventh Circuit upheld Respondents' standing despite explicitly assuming (without deciding) *Gutafson's* applicability to this case:

> Assuming the validity of the premise underlying Defendants' argument – that even if a plaintiff can trace the shares he acquired to a registration statement, he cannot recover under Section 11 unless the registration statement was required as to him – we find the argument without merit because Plaintiffs did acquire their shares of Premiere pursuant to a public offering.

App. at 7-8 (citing *Gustafson*).

In reaching this result, the Eleventh Circuit invoked the well-established "integration analysis" – a fact-specific, multi-factor test that courts have developed to determine whether multiple offerings should be integrated and treated as one for purposes of the registration requirement of the Securities Act of 1933. *Id.* at 9-10. Applying this analysis,

the Court of Appeals found that "all factors point toward integration," App. at 10, meaning a registration statement was required for defendants' sale of shares to plaintiffs, even though plaintiffs conditionally agreed to vote their shares in favor of the Merger transaction prior to the issuance of the Registration Statement. And since "the liability imposed by § 11 flows from the requirements . . . for the filing and content of registration statements," *Gustafson*, 513 U.S. at 571, the Court of Appeals quite logically concluded that plaintiffs have standing in this case. App. at 7-8 and n.5.

Respondents' only rejoinder to the Eleventh Circuit's entirely reasonable, fact-specific finding is their assertion that the integration analysis never has been applied in the Section 11 context. *Id.* at 10 n.5. No persuasive reasoning or citations are offered to show why such application would be wrong – either generally or on the unique facts of this case. Moreover, since Respondents relegate their conclusory reply to a mere footnote, their argument has effectively been waived. *See, e.g., Lutwin v. Thompson*, 361 F.3d 146, 148 n.1 (2d Cir. 2004) ("We decline to consider this argument because '[a] contention is not sufficiently presented for appeal if it is conclusorily asserted only in a footnote.'" (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001)).[4]

4. *See also United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived.") (citing *United States v. White*, 879 F.2d 1509, 1513 (7th Cir. 1989)); *United States v. Mapp*, 170 F.3d 328, 333 n.8 (2d Cir. 1999) ("The placement of this issue in a footnote (only) leads us to decline to consider Moore's claim here.") (citing *United States v. Restrepo*, 986 F.2d 1462, 1463 (2d Cir. 1993)); *Hilao v. Estate of Marcos*, 103 F.3d 767, 778 n.4 (9th Cir. 1996) ("The summary mention of an issue in a footnote, without reasoning in support of the appellant's argument, is insufficient to raise the issue on appeal.") (collecting cases).

B. There Is No Conflict Among the Courts of Appeals

In a desperate bid to bolster their case for review, Petitioners insist that Supreme Court intervention can be justified to resolve a "division in the lower courts" over the scope of this Court's ruling in *Gustafson*. In fact, as Petitioners' own cited cases demonstrate, the only conflict over the applicability of *Gustafson* to Section 11 claims is one between the several Circuit Courts that have held it does not apply,[5] and a few District Courts (principally from the District of New Jersey) that have held it does.[6] Moreover, the precise "division" between these unanimous Courts of Appeal and the dissenting District Courts is over the standing of purchasers in the aftermarket, who must "trace" their shares to an initial public offering. As Respondents are forced to concede, tracing is "logically inapplicable" to case. App. at 8 n.4.

It should be emphasized again that the Eleventh Circuit assumed the relevance of *Gustafson* simply for the sake of argument. *See* App. at 8 n.5 and n.6. Since *Gustafson's* application supported Respondents' standing, resolution of that issue was not critical to the case, and the Eleventh Circuit

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5. *DeMaria v. Andersen*, 318 F.3d 170, 178 (2d Cir. 2003); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 871-72 (5th Cir. 2003); *Lee v. Ernst & Young LLP*, 294 F.3d 969, 977 (8th Cir. 2002); *Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000); *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076 (9th Cir. 1999).

6. *McKowan Lowe & Co. v. Jasmine Ltd.*, 127 F. Supp. 2d 516, 543 (D.N.J. 2000); *Brosius v. Children's Place Retail Stores*, 189 F.R.D. 138, 144 (D.N.J. 1999); *Sturm v. Marriott Marquis Corp.*, 26 F. Supp. 2d 1358, 1370 (N.D. Ga. 1998); *Gannon v. Cont'l Ins. Co.*, 920 F. Supp. 566, 575 (D.N.J. 1996).

reserved final judgment on it for another case. *Id.* As of the filing of this opposition, therefore, Petitioners cannot point to a single Court of Appeals that has held that *Gustafson* applies to Section 11 claims. Accordingly, the question posed by the Petition is not yet ripe and does not merit Supreme Court review at this time.

C. Practical Considerations Favor Denying the Petition

Prudential considerations also counsel against this Court granting the Petition. This Court frequently has denied certiorari in cases for which further proceedings are pending in the lower courts. *See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Fireman & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). As this Court has explained, certiorari jurisdiction is "to be exercised sparingly, . . . [a]nd, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The reasons for this position are obvious: further proceedings in the lower courts may illuminate, or moot, the issues presented by Petitioners, or even bring to light additional certiorari-worthy issues. Judicial efficiency concerns counsel against granting certiorari until the record has been fully developed and all of the questions involved in the case may be considered simultaneously.

The procedural posture of this action makes it particularly likely that further proceedings will yield developments that would substantively affect this Court's review. Once briefing of defendants' renewed summary judgment motion is completed, the District Court will

consider again whether to grant summary judgment on Respondents' claims. If summary judgment is denied, a trial will follow, offering still more opportunities to develop the issues. Those proceedings, or other developments, may moot the Petition entirely. Delaying trial, by contrast, risks prejudicing plaintiff through lost evidence or eroded recollections. *See Clinton v. Jones*, 520 U.S. 681, 707-708 (1997) ("[D]elaying trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts."). This action was filed in 1998, and has been pending in the Northern District of Georgia since 1999. Such passage of time only exacerbates the risk of prejudice. Practical considerations thus militate against granting the Petition.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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In The Supreme Court of the United States

PREMIERE TECHNOLOGIES, INC., N /A PREMIERE GLOBAL SERVICES, INC., BOLAND T. JONES, PATRICK G. JONES, GEORGE W. BAKER, SR., and RAYMOND H. PIRTLE,

Petitioners,

v.

APA EXCELSIOR III, L.P., APA EXCELSIOR III OFFSHORE L.P., APA/FOSTIN PENNSYLVANIA VENTURE CAPITAL FUND, CIN VENTURE NOMINEES LIMITED, STUART A. EPSTEIN, and DAVID EPSTEIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

Premiere Technologies, Inc., n/k/a Premiere Global Services, Inc., is a corporation organized under the laws of the State of Georgia. It does not have a parent corporation, and no publicly-held company owns 10 percent or more of the stock of the corporation.

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PETITIONERS' REPLY TO RESPONDENTS' REASONS FOR DENYING THE WRIT

This Court explained in *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995), that the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77a to 77z-3, is intended to protect open-market investors who must make investment decisions based on limited public information. *See Gustafson*, 513 U.S. at 572. Here, Respondents/Plaintiffs are corporate directors and insiders who (1) had access to confidential, non-public information, and (2) as "gatekeepers" owed a fiduciary duty to the open-market shareholders to exercise reasonable due diligence with respect to the information that was available to them. *See* Pet. at 2-5. Pursuant to *Gustafson*, Plaintiffs are not investors who fall under the protective umbrella of the Securities Act and, accordingly, should not be permitted standing to assert a claim under Section 11, 15 U.S.C. § 77k. This case, thus, presents an opportunity for the Court to clarify the scope of the Securities Act and underscores the importance to the integrity of the markets in having gatekeepers fulfill their fiduciary duty.

Lower courts have applied *Gustafson* inconsistently to Section 11 claims. Some of the lower courts' holdings have extended the reach of a Section 11 claim far beyond its intended limits by permitting broad Section 11 standing, which has ultimately incorporated even those investors, like Plaintiffs here, who are corporate directors and insiders who made their investment decision prior to the effective date of a registration statement pursuant to a privately-negotiated transaction that provided them due diligence rights and access to confidential, inside information. As demonstrated in both Petitioners'/Defendants'

opening papers and below, these opinions do not square with this Court's holding in *Gustafson*.

I. Plaintiffs Do Not Dispute That There Exists a Conflict Among the Lower Courts as to the Applicability of *Gustafson* to Section 11 Claims.

In *Gustafson*, the Supreme Court held that Section 12(a)(2) of the Securities Act, 15 U.S.C. § 77l(a)(2), applies only to securities sold in the public markets based on limited publicly-available information. *Gustafson*, 513 U.S. at 580. Recognizing the lower standard of proof required under the Securities Act, *Gustafson* established unequivocally that the Securities Act creates duties "in connection with public offerings" and that it is a limited statute that does not impact transactions that are "beyond the need of public protection. . . ." *Gustafson*, 513 U.S. at 571-72. Accordingly, under *Gustafson*, Section 11 should also be narrowly construed, and standing to bring a claim thereunder should be limited to purchasers who require public protection and who acquired, in the public market, shares that were issued pursuant to a registration statement. Some lower courts have recognized this authority and have ruled in line with it. *See, e.g.*, *McKowan Lowe & Co. v. Jasmine Ltd.*, 127 F. Supp. 2d 516, 543 (D.N.J. 2000), *vacated on other grounds by*, 295 F.3d 380 (3d Cir. 2002); *Brosious v. Children's Place Retail Stores*, 189 F.R.D. 138, 144 (D.N.J. 1999); *Sturm v. Marriott Marquis Corp.*, 26 F. Supp. 2d 1358, 1370 (N.D. Ga. 1998); *Warden v. Crown Am. Realty Trust*, No. Civ.A. 96-25J, 1998 WL 725946, at *2 (W.D. Pa. Oct. 15, 1998); *Gannon v. Cont'l Ins. Co.*, 920 F. Supp. 566, 575 (D.N.J. 1996).

In contravention to *Gustafson*'s guidance as to the scope of the Securities Act, other lower courts have

deemed *Gustafson* inapplicable to Section 11 and have issued opinions that attempt to expand the scope of the Securities Act. These courts have specifically noted that a broader reading of Section 11 is "truer to the legislative spirit behind the Securities Act in providing the broadest possible protection to purchasers. . . ." *Joseph v. Wiles*, 223 F.3d 1155, 1161 (10th Cir. 2000). Disregarding the parallel principles underlying Section 11, Section 12, and the Securities Act as a whole, courts so inclined have ruled that "there is nothing in the reasoning or underlying logic of *Gustafson* that indicates that we should read into Section 11 [the narrow requirements] of Section 12." *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1081 (9th Cir. 1999); *see also DeMaria v. Andersen*, 318 F.3d 170, 178 (2d Cir. 2003); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003). Such an expansive reading of the Securities Act as applied to Section 11, however, is in conflict with this Court's mandate in *Gustafson* and makes the lower court split on the issue prime for review on a writ of certiorari.

Plaintiffs' Brief in Opposition overlooks the current confounded state of the law as to *Gustafson* and its applicability to Section 11. Plaintiffs argue, in conclusory fashion, that, even if *Gustafson* applied to their Section 11 claim, "resolution of the question [the Petition] attempts to present is irrelevant to the case at bar [because Plaintiffs'] position consistently has been that *Gustafson* confirms their standing in this case because they received stock pursuant to a registration statement and prospectus filed with the SEC to effectuate a public offering." Br. in Opp'n at 6. Plaintiffs' argument misses the point.

In this case, the plaintiffs asserting standing are directors of a public company who committed to purchase

the securities at issue pursuant to a privately-negotiated deal before the effective date of the Registration Statement. As stated in the Petition, Plaintiffs were sophisticated investors with significant due diligence rights, pursuant to which they committed to acquire Premiere shares via Stockholder Agreements. *See* Pet. at 2-5. Plaintiffs did not acquire their shares in the public market and are, instead, insiders who have no need for the protections of the Securities Act. The protections of the Securities Act were intended to reach only public-market purchasers who would otherwise not be entitled to or have access to inside information like that made available to Plaintiffs here. *See, e.g.*, 77 Cong. Rec. 2910, 2982-83 (May 5, 1933), *reprinted in* 1 Fed. Sec. Laws 168, 218-19 (1983); H.R. Rep. No. 73-85 at 2-3 (May 5, 1933). If, pursuant to this Court's review, *Gustafson* definitively bars Section 11 standing for Plaintiffs, they would have no remaining claim in this case, and any lower court proceedings would be moot.

Plaintiffs further contend that the "Eleventh Circuit upheld [their] standing despite explicitly assuming (without deciding) *Gustafson*'s applicability to this case. . . ." Br. in Opp'n at 6. As an initial matter, the Eleventh Circuit noted that *Gustafson* provided some authority for Petitioners' argument but nonetheless ruled that standing existed. App. at 8 n.5. Moreover, Plaintiffs abandoned at oral argument their Section 12 claim, presumably because they knew it was barred by *Gustafson*. *See* App. at 2. It follows that, if *Gustafson* applies to Section 11, then Plaintiffs' case would have been dismissed in its entirety. Thus, Plaintiffs cannot credibly argue that *Gustafson* was not relevant in the Court below.

Overlooking the binding and dispositive authority of this Court's precedent, the Eleventh Circuit wrongly invoked the integration doctrine, which has never been applied to a Section 11 claim, to convert the private deal as to these Plaintiffs into a public one.[1] App. at 9-10. Thus, although the Eleventh Circuit recognized *Gustafson*'s potential impact on the case, it nonetheless ignored *Gustafson*'s guidance and carved out an exception to provide Section 11 standing to directors and officers, like Plaintiffs here, who had due diligence rights and access to confidential, inside information. In addition, although observing that, when Congress enacted Section 11, it is unlikely that it "contemplated the factual scenario present in this case[,]" and that Plaintiffs would be deemed to have received their stock in a private deal but for the integration doctrine, the Eleventh Circuit nevertheless granted Plaintiffs standing to assert their Section 11 claim. App. at 9, 15. Consequently, in both actual analysis and practical effect, the Eleventh Circuit failed to apply *Gustafson* as demanded by this Court's articulation therein of the policy underlying the Securities Act.

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[1] Agreeing that the integration doctrine has never been applied in the Section 11 context, Plaintiffs assert that this Court cannot consider the issue of the applicability of the integration doctrine to the present facts because Defendants addressed it in a footnote in their Petition. Br. in Opp'n at 7. Plaintiffs misunderstand Defendants' arguments. Defendants are not attempting to place the integration doctrine squarely before this Court. Instead, Defendants' Petition focuses on the extension of *Gustafson* to Section 11. As a result, Defendants assert that Plaintiffs are barred from Section 11 standing according to the principles underlying the Securities Act, as articulated in *Gustafson*. Defendants only reference the integration doctrine where necessary to demonstrate the fundamental contradiction between *Gustafson* and the Eleventh Circuit's holding.

II. Plaintiffs' Arguments[2] Would Incentivize Corporate Insiders to Breach Their Fiduciary Duties to Shareholders.

Plaintiffs' argument that this case turns on factually specific questions and "[i]s [n]ot a [p]roper [v]ehicle for [r]esolving the [q]uestion [p]osed by Petitioners" is misleading. Br. in Opp'n at 6.

Expanding Section 11 standing to directors and inside investors would be inconsistent with corporate governance

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[2] Plaintiffs unconvincingly suggest that "[p]rudential considerations" counsel against allowance of the writ. Br. in Opp'n at 9. The procedural posture of this case presents no barrier to effective review by this Court because the District Court has represented that it will defer any merit-based decisions in the case, pending this Court's resolution of the Petition and any briefing and argument on the merits. In addition, given the threshold nature of the Petition, further proceedings in this case at the District Court level would not only tax the parties' resources, but would also waste judicial resources. Accordingly, resolving this issue now would benefit the parties in this case as well as all those involved in this important area of securities law affecting public companies. Lastly, the cases cited by Plaintiffs to advocate that a writ of certiorari should not be granted where proceedings are pending in the lower courts are distinguishable. *See id.* In *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327, 328 (1967), this Court declined the writ because the Appeals Court had remanded the case for further factual findings that would be relevant to this Court's review. Such is not the situation in the instant case. *See* App. at 21; *see also Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (denying application for writ of certiorari because "the application was opposed by the present petitioner upon the ground that the case, however important to the parties, involved no question of public interest and general importance, nor any conflict between the decisions of state and [f]ederal courts, or between those of [f]ederal courts of different circuits"); *Am. Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384, 388 (1893) (discussing distinctions between appeal from an interlocutory order and a final decree and ultimately granting order "to show cause why a writ of certiorari should not issue").

principles. Directors of public companies perform an essential gatekeeping function to protect shareholders from fraudulent conduct. To fulfill their fiduciary obligations to shareholders, such directors, empowered with due diligence rights, must, at a minimum, act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest. *See Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 927-28 (Del. 2003) (describing conduct entitled to the presumption created by the business-judgment rule). The extension of Section 11 standing to such corporate fiduciaries and gatekeepers will discourage them from properly exercising these obligations. If inside investors may seek to recover any financial losses accruing to them via a Section 11 claim with a lower threshold for liability than a securities fraud action under Section 10(b),[3] they will lack the proper incentive to exercise their responsibilities to the fullest extent required by their fiduciary obligations.

A clarification of *Gustafson* is particularly timely, given the increasing legal and policy emphasis on directorial responsibilities toward shareholders. Congress has specifically spoken on this issue via the Sarbanes-Oxley Act, which authorized enhanced criminal sentences for fraudulent conduct by directors and officers. *See* Sarbanes-Oxley Act of 2002 §§ 805, 1104 (2002); 28 U.S.C. § 994. The Securities and Exchange Commission (SEC) has likewise reinvigorated enhanced scrutiny of directors and has propounded a view of directors as "gatekeepers." In the SEC's own words, directors

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[3] 15 U.S.C. § 78j(b).

> must redefine corporate governance with practices that go beyond mere adherence to new rules and demonstrate ethics, integrity, honesty, and transparency. . . . Directors must ensure that they remain the true stewards of corporate accountability, and their actions must demonstrate their dedication to this stewardship without undue interference. . . .

SEC Chairman William H. Donaldson, Remarks Before the Directors Education Institute (Mar. 16, 2005) (*available at* http://www.sec.gov/news/speech/spch031605whd.htm). Even in the legal realm, there has been a recent spate of high profile cases in which the Delaware courts and others have spoken to the issue of directors' fiduciary duties to the shareholders of public companies. *See, e.g., In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 258 F. Supp. 2d 576 (S.D. Tex. 2003); *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004); *In re Walt Disney Co. Deriv. Litig.*, 825 A.2d 275 (Del. Ch. 2003); *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917 (Del. Ch. 2003). Thus, the timeliness and relevance of the issues raised by this case concerning the duties and obligations of directors provide this Court with an opportunity to speak on current developments in corporate governance and militate in favor of allowing the writ so as to provide guidance on these important questions.

CONCLUSION

This Petition should be granted fundamentally because there is disagreement among the lower courts over the applicability of *Gustafson* to claims brought under Section 11. Clarification of *Gustafson* will, therefore, have a meaningful impact on Section 11 standing and on the

scope of the remedies available under the Securities Act. In particular, *Gustafson* should be explicitly held to bar Plaintiffs from seeking recovery under Section 11. For these reasons, the Petition for Writ of Certiorari presents a question that is ripe for this Court's review and should be granted.

Respectfully submitted,

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